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THE LAW

OF

MORTGAGE

AND

OTHER SECURITIES UPON PROPERTY.

BY

WILLIAM RICHARD FISHER,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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Fis

Second Edition.

IN TWO VOLUMES.

VOL. I.

N b 16

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LONDON:

BUTTERWORTHS, 7, FLEET STREET,

Law Publishers to the Queen's most excellent Majesty.

HODGES, SMITH & CO., GRAFTON STREET, DUBLIN.

1868.

346.04364054
Fis/Law
78578

LONDON:
PRINTED BY C. ROWORTH AND SONS,
NEWTON STREET, W.C.

PREFACE.

In the first edition of this treatise the Author merely attempted to work out those parts of the Law of Mortgages, which embrace the equitable remedies of mortgagors and mortgagees, and the principles upon which the priorities of the latter among themselves are ascertained. The book has for several years been out of print, and it has now been converted into a treatise upon Securities affecting Property, the general law of which, notwithstanding the numerous modern enactments and decisions affecting it, has not for many years been illustrated by any new text book.

The object of the Author has been to explain the nature of the different kinds of securities, the rights and equities which they create, and the manner of and circumstances attending their discharge. He has met with many difficulties in the arrangement and working out of the subject; for among the many kinds of securities there are not two, even of such as are cognizable by the same jurisdiction, which involve precisely the same rights and remedies; while from their diversity of origin, their separate and gradual adaptation to the convenience of borrowers and lenders and the exigencies of commerce, and from the nature of the different kinds of property which they affect, they probably embrace a

greater variety of learning than any other single branch of the English law.

Considering the extent of this branch of the law, the number of the sources from which it is drawn, and that it is administered under several jurisdictions proceeding upon different principles, there appears to be more harmony in the general results than might have been expected. The greatest difficulties occur in the law of Priority, and although cases upon this subject are of course complicated by the peculiar doctrine of the English law as to the possession of the legal estate, a want of uniformity in the decisions of Courts of Equity, and the departure from well-established rules, in favour of distinctions arising out of the numerous frauds which have occurred in late years, appear to have caused much of the uncertainty which prevails.

The introductory pages were not prepared for this work, or until a considerable part of it had been printed. They form part of a paper which was lately submitted by the Author to the Digest of Law Commissioners; and he afterwards considered that they might be usefully placed in their present position. Although some parts of them are almost repetitions of parts of the original work, they comprise in the whole a series of definitions which are not to be found in it, or, so far as the Author is aware, in any other book, and he has therefore thought it better to reprint them without alteration.

The addition of the new matter relating to those parts of the subject which were previously untouched, and the

necessary reconstruction of a great part of the old work, have cost more time and labour than were required for the first edition. It cannot be expected that a book, the materials for which were collected and worked up during the writer's intervals of leisure, and upon which he was unable to labour without interruption, should be free from error; but it is hoped that the imperfections are not greater than under such circumstances may be reasonably excused. The Author is indebted to several friends for valuable suggestions and information; and also to Mr. J. T. Prior, of the Chancery Bar, who has most kindly assisted in the tedious but important work of revising the printed sheets, and by whose care and attention many imperfections have been avoided.

2, New Square, Lincoln's Inn,
May, 1868.

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ERRATA.

Page 117, line 16, *for* "Crown Debts, &c., Act," *read* "Crown Suits, &c., Act."

„ 234, last line but two, *dele* "reversionary."

„ 269, line 17, *for* "(1790)," *read* "(1881)."

„ 460, note (*n*), *for* "s. 34," *read* "s. 4."

„ 738, last line and page 739 first line, *for* "to her or to her and her husband," *read* "to her and her husband or to him."

„ 779, note (*d*) *for* "Stone," *read* "Sterne."

„ 806, n., *for* "Everton," *read* "Ellerton."

„ 1015, line 3, *for* "the purchaser," *read* "the first purchaser."

ADDENDA.

Page 116. Sect. 114 of 25 & 26 Vict. c. 89, Joint Stock Companies Act, 1862 (*lis pendens*), repealed by 30 & 31 Vict. c. 47, s. 1.

„ 230, (404) note (*e*). See *Fountaine* v. *Carmarthen Railway Company*, L. R., 5 Eq. 316.

„ 233, (408). As to legality of mortgage of calls by railway company, see *Pickering* v. *Ilfracombe Railway Company*, L. R., 3 C. P. 235.

„ 235, (411), *add* "the security is not made good, because the agreement for the loan was before the marriage. *Prole* v. *Soady*, L. R., 3 Ch. App. 220."

„ 235, (412). The carrying over a fund in court to the account of the husband and wife will not be a reduction of the fund into possession.

The mortgage by the husband of the wife's land tax, after he has been registered as husband under 38 Geo. 3, c. 60, s. 78, is binding to the extent of the security, but is no alienation of her interest as survivor beyond the amount of the mortgage debt. *Prole* v. *Soady*, L. R., 3 Ch. App. 220.

„ 253, (443). The person intrusted must be an agent intrusted at the time of the pledge. If at that time his authority was revoked, so that he held as a wrongdoer, the pledge is not protected. *Fuentes* v. *Montis*, L. R., 3 C. P. 268.

„ 255, (448). The statute does not protect a pledge for an antecedent debt, but only for an actual advance. It therefore does not apply to a pledge made for the purpose of taking up a bill given to secure an antecedent debt. *Macnee* v. *Gorst*, L. R., 4 Eq. 315; and see *Jewan* v. *Whitworth*, *id.*, 2 Eq. 692.

„ 377, (577). A mortgage of sheep with the issue, increase and produce thereof, held limited to the issue and increase of the specific sheep, and not to include sheep substituted for those specified in the original mortgage. *Webster* v. *Power*, L. R., 2 P. C. 69.

„ 494, 495, (900, 902). Payment into court by the garnishee under a judge's order is a payment within sect. 65 of the Common Law Procedure Act, 1854, and discharges the garnishee. *Culverhouse* v. *Wickens*, L. R., 3 C. P. 295.

„ 497, (903). To note (*q*) *add* "*Robinson* v. *Nesbitt*, L. R., 3 Eq. 264."

„ 506, (925). As to conditions on sale by mortgagee of reversionary interest, see *Cragg* v. *Alexander*, W. N. (1867), 305.

„ 523, (955). A judgment creditor cannot obtain relief under 27 & 28 Vict. c. 112, s. 4, where by reason of a prior elegit the land has not been actually delivered in execution to him. But he may file a bill to assert his equitable rights until the removal of the legal impediment (627). *In re Cowbridge Railway Company*, L. R., 5 Eq. 413.

„ 525, 526, (961). As to the decision in *Pell* v. *Northampton and Banbury Railway Company*, see *Bishop of Winchester* v. *Midhants Railway Company*, L. R., 5 Eq. 17.

„ 606, (1117). Notice to the official liquidator of the assignment of a debt due from the company is sufficient to perfect the assignment. *In re Breech Loading Armoury Company*, L. R., 5 Eq. 284.

„ 695, (1265), note (*p*). But see *Browne* v. *Tanner*, on app., W. N. 1868, p. 154.

„ 720, (1297). The decision of the majority of the Court of Queen's Bench in *Watts* v. *Porter*, disapproved by Court of Common Pleas in *Pickering* v. *Ilfracombe Railway Company*, L. R., 3 C. P. 235.

„ 770, (1385). To note (*o*), *add* "*Bernard* v. *Norton*, 10 L. T., N. S. 183."

„ 778, (1400). To note (*s*) *add* "See also 23 & 24 Vict. c. 145, s. 29, making the receipts of trustees under trusts created since 28 August, 1860, good discharges; and s. 23 of 22 & 23 Vict. c. 35, is considered not to be retrospective.

„ 995, (1797). As to circumstances under which foreclosure will be opened after order absolute, see *Patch* v. *Ward*, L. R., 3 Ch. App. 203.

„ 1005, (1815). A mortgagee may refuse to execute a reconveyance containing incorrect recitals, but not a reconveyance without recitals which is approved by all the parties interested in the equity of redemption. *Hartley* v. *Burton*, L. R., 3 Ch. App. 365.

„ 1007, (1820). See *Pease* v. *Jackson*, on app., W. N. 1868, p. 153.

„ 1069, (1975, 1976). See *Fountaine* v. *Carmarthen Railway Company*, L. R., 5 Eq. 316.

INTRODUCTION (*a*).

A SECURITY is a redeemable estate or right which one person has in the property of another, for securing the payment of an existing or intended debt or charge.

Securities may be classed according to the nature of the creditors' interest in them; which may be

1. An actual estate or property general or special.
2. A right only without any property.

Or, according to the circumstances under which they arise, as

1. By contract.
2. By the mere will of the owner of the property charged.
3. By operation of law.

A contract for a security upon property can be enforced only when it is to secure an existing debt, or when money has been advanced on the faith of it.

Courts of Equity will neither decree performance of, nor give damages for, the breach of a mere contract to borrow or lend money on a security (*b*) (3).

(*a*) See Preface.

(*b*) Rogers *v.* Challis, 27 Beav. 175; Sichel *v.* Mosenthall, 8 Jur., N. S. 275; Hunter *v.* Langford, 2 Mol. 272.

Securities may be created or may arise,

I. By MORTGAGE, which may be *legal* or *equitable.*

The *legal* mortgage may be one of two kinds, viz.:—

1. The mortgage (proper), which is an assurance to the creditor of the whole or part of the debtor's *general* property, in real or personal estate, conditional upon the non-payment, and redeemable at law upon payment of, a debt at a fixed time; and upon breach of the condition becoming absolute at law, and redeemable in equity, until the expiration of a certain period; unless the right of redemption be sooner foreclosed by judicial process at the suit of the creditor, or be destroyed by sale under judicial process or under a power incident to the security (**8, 11**).

   It entitles the mortgagee to immediate possession before default in payment (*b*) (**832**).

   And it implies a debt, for the recovery of which an action will lie against the debtor (*c*); but which is only of the nature of simple contract, unless it be converted into a specialty by bond or covenant (*d*) (**1321**).

2. The Welsh mortgage, which is an assurance of property to the creditor, without condition for payment; and of which possession and receipt of the rents and profits by the mortgagee, either in lieu of interest or for payment of interest and principal, are necessary incidents (*e*) (**12**).

(*b*) Doe *d.* Roylance *v.* Lightfoot, 8 M. & W. 553.

(*c*) King *v.* King, 3 P. W. 358; Yates *v.* Aston, 4 Q. B. 182.

(*d*) Per Lord Thurlow, Ancaster *v.* Mayer, 1 Bro. C. C. 464; per Sir T. Plumer, Quarrell *v.* Beckford, 1 Mad. 278.

(*e*) See Orde *v.* Hemming, 1 Vern. 418; Yates *v.* Hambly, 2 Atk. 363; Longuet *v.* Scawen, 1 Ves. 403; Fenwick *v.* Reed, 1 Mer. 125; Teulon *v.* Curtis, Younge, 610; Balfe *v.* Lord, 2 Dr. & War. 480.

Being unconditional it admits of no foreclosure, but is redeemable at law as well as in equity, until, after full payment of the debt out of the profits of the estate, the right is barred by the statutory limitation (12).

It implies a debt for the purpose of adjusting the equities between the real and personal estate of the debtor, but not so as to give any right of action against him (*f*) (1322).

The *equitable* mortgage is a mortgage which, for want of the legal estate, operates only in equity (9).

When it amounts to a contract for a legal mortgage, the creditor may demand the same rights which are conferred by that security, subject to the rights of prior creditors (953). Otherwise it is doubtful if the right against the estate is more than a right of judicial sale.

II. By PLEDGE or PAWN, under which, by virtue of an actual or constructive delivery and possession of a personal chattel, or of prior possession supported by contract, a *special* property only is vested in the pawnee, as a security for a debt or engagement (*g*) (97, 98). Upon nonpayment at the day (if any be fixed) the absolute property does not vest in the pawnee (463), and the pawnor after tender may sue for the chattels at law (*h*); and in certain cases has also a right to redeem in equity, unless the pawnee have properly sold the pledge under the power of sale which is incident to his security (*i*) (905).

(*f*) See Howell *v.* Price, 1 P. W. 291; Longuet *v.* Scawen, supra.

(*g*) See judgment of Holt, C. J., in Coggs *v.* Bernard, Lord Raym. 909; Story, Bailm. s. 297.

(*h*) Com. Dig. 5, 149; Story, Bailm. ss. 345, 346. See Glanv. bk. 10, cc. 6, 8.

(*i*) Pothonier *v.* Dawson, Holt, N. P. R. 385; Kemp *v.* Westbrook, 1 Ves. 278; Story, Bailm. ss. 308, 309.

III. By HYPOTHECATION, which (in the English law) vests in the creditor neither an absolute nor a special property, nor any right of possession, but a right of realization by judicial process in case of non-payment of the debt at the time fixed (*k*).

This embraces two forms of security, viz.:—

1. The contract of *bottomry*, by which a ship and freight, with the cargo (if necessary), are made liable by the master as the agent of the owner, failing other resources, for the payment, within a certain time after the safe arrival of the ship at her destination, of a debt contracted to supply what is necessary for the preservation of the ship, or the continuance of the voyage. It requires that there shall be a maritime risk, to be ascertained from the contents of the instrument; and it creates a debt (which is generally only treated as nominal) against the master, but none against the owner (*l*) (**109, 110, 1270**).
2. The contract of *respondentia*, which is a like form of security upon the cargo only, founded upon the same necessity for the preservation of the property, and governed by the same principles as the contract of bottomry (*m*); but binding (it is said) the owners of the cargo personally (*n*) (**130**).

IV. By EQUITABLE ASSIGNMENT, which is of an hypothecatory nature; being an appropriation, for the payment of a debt, of property of the debtor in the hands of a third

(*k*) See judgment of Holt, C. J., Johnson *v.* Shippen, 2 Lord Raym. 982; Stainbank *v.* Fenning, 11 C. B. 51; Stainbank *v.* Shepard, 17 Jur. 1032.

(*l*) See The Atlas, 2 Hag. A. R. 48; The Emancipation, 1 W. Rob. Ad. 124; Stainbank *v.* Shepard, supra; The Jonathan Goodhue (Jones), Swab. 524; per Dr. Lushington, L. R., 1 Ad. 14.

(*m*) See per Dr. Lushington, Cargo ex Sultan, 5 Jur., N. S. 1060.

(*n*) 2 Bl. Com. 458.

person; and effected either by agreement or by an order upon the holder of the property, which bind him after notice in equity, and after notice and assent at law (*o*) (**63—67**).

All these securities are created by contract.

V. By a CHARGE upon property for the payment of money. This does not pass any property, or imply a personal debt, but confers a mere right of realization by judicial process, and in some cases a power of distress (**8**).

This is sometimes created by contract and sometimes by the mere mandate of the owner of the property charged.

VI. By LIEN, of which there are several forms, viz.:—

1. Obligations established by judgments and decrees of courts of law and equity, giving the creditor no instant right of possession against the property of his debtor, but enforceable against it by judicial process under statutes (**5, 132, 874**).
2. Obligations raised upon the consideration of a duty or implied intention on the part of the owner of property to make it answerable for a specific claim; not requiring for their validity, or giving any right to, possession by the creditor, but enforceable by sale under judicial process (**5, 961**).
3. Obligations also raised upon equitable principles, and which subject personal chattels of the debtor, in some cases to the general, in others only to the specific claim of the creditor, but so long only as he holds possession; the right to retain which is his sole remedy. To the validity of such liens possession is as absolutely necessary in equity as at law (*p*) (**5, 906.**)

(*o*) See Smith *v.* Everett, 4 Bro. C. C. 63; Burn *v.* Carvalho, 4 M. & C. 690; Ex parte Steward, 3 M., D. & De G. 265; Williams *v.* Everett, 14 East, 582; Bacon *v.* Husband, 4 B. & Ad. 611.

(*p*) See judgment of Sir W. Grant, Gladstone *v.* Birley, 2 Mer. 403.

Liens arise by operation of law (*q*).

For although judgments are often, and for many centuries have been, confessed and entered up in pursuance of contracts between debtor and creditor, yet, in contemplation of law, they always pass *in invitum;* the object of the voluntary confession being only to shorten and lessen the cost of the judicial process (*r*).

And although contracts are sometimes expressed to be made for mercantile liens, no actual liens are so conferred (6). The express stipulation and agreement for a security excludes the lien, and limits the rights by the extent of the express contract. *Expressum facit cessare tacitum* (*s*).

(*q*) Per Sir W. Grant, 2 Mer. 404; per Lord Westbury, In re Leith's estate, L. R., 1 P. C. 305.

(*r*) Per Lord Kenyon, 8 T. R. 61; per Lord Tenterden, 10 B. & C. 468.

(*s*) Per Sir W. Grant, 2 Mer. 404; per Lord Westbury, L. R., 1 P. C. 305.

THE LAW OF MORTGAGE

AND

OTHER SECURITIES UPON PROPERTY.

CHAPTER I.

OF SECURITIES BY CONTRACT.

PART 1.—OF MORTGAGES LEGAL AND EQUITABLE.
PART 2.—OF PAWNS OR PLEDGES.
PART 3.—OF HYPOTHECATIONS.

PART 1.—OF MORTGAGES LEGAL AND EQUITABLE.

1. *Of the Nature of Securities upon Property.*
8. *Of Securities by Contract.*
11. *Of legal Mortgages of Real and Chattel Real Estate.*
29. *Of Mortgages of Chattels personal.*
40. *Of equitable Mortgages and Assignments.*
68. *Of the Registration of Mortgages and Bills of Sale.*
87. *Of Mortgages of Ships.*

Of the Nature of Securities upon Property.

1. A SECURITY is an estate or right which a creditor has in the real or personal estate of his debtor, for insuring the repayment of an existing or intended debt or loan; it is subject to a right of redemption by the debtor, on payment within a limited time of the principal sum due to the creditor, with his interest and costs; and in case of non-payment it confers upon the creditor a right to satisfy his debt by receiving the rents and profits of the estate, or by sale or foreclosure,

whereby the right of redemption is for ever barred; or merely to detain the property until the debt has been discharged.

2. The rights of redemption and foreclosure are for the most part reciprocal. Where there is a right to foreclose there must of necessity be a right to redeem; because foreclosure is in default of redemption, and every decree to foreclose limits a time for redemption.

The non-exercise of the right to redeem is also commonly, though not necessarily, followed by foreclosure (**12, 21, 1766**).

3. Securities may be created by contract, or may arise by operation of law.

By contract where money has been lent on the security of property, or a debt or other sum of money has been secured or agreed to be secured upon it. A mere contract to deposit property for sale, and out of the proceeds to pay advances made by the intended depositee, will not amount to a security, if it appear that the advances were not in fact made *on the security* of the property (*a*), but will be treated only as a contract to make a deposit. And Courts of Equity will not enforce such a contract, or a contract to borrow or lend money on mortgage or otherwise, the damage being a mere money demand the amount of which can be calculated; nor will damages be given in equity for the breach of such a contract (*b*).

4. Upon the principle that whatever is agreed to be done, is in equity considered as done, effect will be given to an intention to create a security by a person capable of creating it, notwithstanding any mistake in the manner of making it (**403**) (*c*); and securities will take effect according to the intention of the parties, both as to the quantity of the property charged and the extent of the mortgagor's interest in it. If, therefore, the mortgagor be possessed of something which can

(*a*) Chinnock *v.* Sainsbury, 6 Jur., N. S. 1318.

(*b*) Chinnock *v.* Sainsbury, supra; Rogers *v.* Challis, 27 Beav. 175; see Sichel *v.* Mosenthall, 8 Jur., N. S. 275; Hunter *v.* Langford, 2 Mol. 272. This rule seems to have been overlooked in the case of The Alliance Bank *v.* Brown, 2 Dr. & S. 289; 10 Jur., N. S. 1121; where a demurrer to a bill for the performance of an agreement to make a security was argued only on the question of want of consideration, and was overruled on the ground that the forbearance of the creditor to sue in consequence of the agreement was sufficient.

(*c*) In re Strand Music Hall Company, 13 L. T., N. S. 177.

be identified as the intended subject of the security, the latter will be limited to the quantity specified, though that quantity may exist only as part of a larger property specified in the security: on the other hand, the security will affect the interest really possessed by the mortgagor, though he purport to pass an estate which is not really vested in him (*d*).

5. Securities which arise by operation of law are considered in this work under the general title of LIENS (*e*); they comprise not only the rights created by actual judgments and decrees of Courts of Law and Equity, but divers other rights established upon equitable principles in favour of creditors against the property of their debtors, and cognizable, some in equity only, others both at law and in equity; such as are recognized under both jurisdictions requiring for their validity at law actual possession of the property upon which the lien is claimed (*f*), and without such possession being as invalid in equity as at law (*g*); while liens which are purely equitable do not require possession, and are raised upon the mere consideration of an implied intention or duty on the part of the owner of the property to make it specifically liable to the claim.

6. Judgment liens now derive their force entirely from the numerous statutes which from time to time have been made

(*d*) Grieves *v.* Kirsopp, 5 Beav. 283; Woodburn *v.* Grant, 22 Beav. 483; Wainwright *v.* Hardisty, 2 Beav. 363.

(*e*) The use of the word "lien," which is a French word signifying "a tie," is of comparatively modern date in our law language. The right of retainer which was allowed by the English law, at least as early as the reign of Edward IV., is not mentioned by this name in the early reports; and the word "lien" appears not to have found its way into the law dictionaries so late as 1671 and 1672. Editions of Termes de la Ley, and of Cowell's Interpreter, printed in those years, do not contain it. The want of precision in its use is remarkable. A common law lien depends upon retainer, and as there can be no retainer without possession, the word itself is often said to imply possession, although it appears to have no such force, and even at law is used to denote the right of a judgment creditor. But in equity it is used not only in the common law sense, and as implying an equitable right, not depending upon possession (such as the vendor's lien for the purchase-money of land), but is also often applied to equitable mortgages (**1043**), and securities of a like nature, which rest simply upon contract.

(*f*) Heywood *v.* Waring, 4 Camp. 291.

(*g*) Gladstone *v.* Birley, 2 Mer. 401.

for their regulation. And although for many centuries (*h*) securities by judgment have, for convenience, been effected under contracts, and by the voluntary acts of debtors, as well as by hostile judicial process, yet, in contemplation of law, they are always considered to have been obtained in invitum; the object of the voluntary confession of them being only to shorten and to lessen the cost of the judicial process (*i*). Other liens, particularly such as arise under the law maritime, have also been modified or created by statute; and rights, corresponding to liens, may be granted by express or implied contract, in cases in which liens would not have arisen by law: provided that the terms of the contract do not, by express stipulation as to the extent of the security, tacitly exclude the right of lien (*k*).

7. Liens, which are not of the nature of judgments, may therefore be divided into such as do, and such as do not, depend upon the possession by the claimant of the property sought to be affected. The latter affect both real and personal estate, and the limitations to which they are subject, arising for the most part out of the same equities as the liens themselves, may be more conveniently stated in the separate consideration of each kind of lien (**188—251**). But possessory liens, which only affect chattels, are subject to certain fixed rules respecting the nature and effect of the possession upon which they depend, and upon other matters, which will be noticed immediately before the consideration of this class of liens (**252—259**).

Of Securities by Contract.

8. Securities by contract may be either by *mortgage* (**9**); which is a conveyance or assignment to the creditor of the whole or part of the debtor's interest in real or personal estate, implying the existence of a debt (**1321**) and conditional upon its non-payment on a certain day, but becoming

(*h*) "When debt is recovered or *knowledged* in the King's Court." Stat. Westm. 2, c. 18, 13 Edw. I., A.D. 1285.

(*i*) Per Lord Kenyon, 8 T. R. 61; Doe *d.* Wigan *v.* Jones, 10 B. & C. 468.

(*k*) See judgment of Lord Westbury, In re Leith's Estate, Chambers *v.* Davidson, 1 L. R., P. C. 305.

absolute at law upon breach of the condition; or, as in the Welsh mortgage (**12, 13**), without any such condition; by *pledge* or *pawn* (**97**), which is created by delivery of personal chattels by the debtor to the creditor as security for the debt, and confers upon him a special property in the pledge: or by *hypothecation*, which, as it is known to the English law, confers neither an absolute nor a special property upon the creditor, but only a right of realization, for payment of the debt, by a judicial process (*l*). As regards moveables, hypothecation is adopted in this country only in contracts of bottomry and *respondentia* (**109, 128**). As to immoveable property, the kind of security most nearly allied to an hypothecation, is a charge of a portion or other sum of money under a will or settlement; which, not arising by operation of law, cannot properly be called a lien; and being without

(*l*) Under the Roman civil law the *hypotheca* passed the legal interest in the security, whether it were moveable or otherwise, without possession: hence the remedy could be by judicial process only. The *pignus* required possession by the creditor, and that being given, it is said to have been applicable to immoveable as well as to moveable property. (Colquh. §§ 1463—1465.) The *hypothèque* of the French law affects only immoveable property used in commerce, its immoveable accessories, and their usufruct. It is divided into legal, judicial and conventional hypothèques, the two former of which answer to certain of our forms of equitable lien and to judgments. And it does not affect moveable property. (Code Civil, §§ 2114—2120.) In this last particular it agrees with the laws of most of the continental states of Europe, of the United States of America and of Scotland and England (Burge, iii. 573); setting aside as to the latter the exceptional form of hypothecation mentioned above.

The same rule obtained under the *Coutume de Paris* and the *Coutumes de Normandie*, and is still current in Jersey (Hayley *v.* Bartlett, 14 Moo. P. C. 251; Horlock *v.* Nugent, Cook *v.* Dodd, in the Royal Court of Jersey, id.), the laws of which island and of Guernsey follow the customs of Normandy. The *gage* of the French law agrees with our pledge in requiring that the security be delivered to and remain in the possession of the creditor, or of a third person appointed by the parties; but it requires a registered instrument (Code Civil, §§ 2074—2076), whereas no writing is required by the law of England for the validity either of a mortgage or a pledge of chattels.

In all the British colonies, except British Guiana, the Cape of Good Hope, Ceylon, St. Lucia, Lower Canada and Trinidad, the law of England on the subject of mortgages (subject to local modifications) generally prevails. (3 Burge, Col. Law, 277.) In the three former colonies the Roman Dutch law, in St. Lucia and Lower Canada the custom of Paris, and in Trinidad the law of Spain is in force. Guernsey and Jersey retain the customs of Normandy, and the Mauritius the Code Civil. (1 Id. xiv.; and see chapters 12 and 17 as to the colonial laws concerning mortgages and pledges. See also Bentinck *v.* Willink, 2 Hare, 1, as to mortgages in British Guiana.)

condition or express or implied contract for possession, does not answer to any form of mortgage; but resembles the English form of hypothecation in conferring upon the creditor a right to have his charge realized by sale under a judicial process.

9. A mortgage may be legal or equitable (**40**): the nature of the latter being, that no legal interest in the property mortgaged passes to the mortgagee. Among such securities, are included not only mortgages of the right or equity of redemption (**464**) of property which is already in mortgage, but also contracts for mortgages, and other transactions in which equitable interests in property, or the evidences of them, become vested in the creditor, upon a written or verbal, express or implied agreement, that such property shall be liable to be mortgaged for the debt (**40**). And although such a security cannot be set up as a defence to an action of ejectment by the mortgagor (*m*), it is for some purposes recognized by Courts of Law; which will not permit the assignees of the owner of the estate to recover from his equitable mortgagee the rents which he has received in that character (*n*).

10. A mortgage security may be transferred either absolutely or by way of sub-mortgage, and with or without the concurrence of the mortgagor; but in his absence, the transferee is bound by the actual accounts and equities which subsist between the mortgagor and the transferor, whatever may have been the representations of the latter to the transferee.

It is usual upon the transfer of a mortgage to make a separate assignment of the debt when the mortgagor is not a party, or when, being a party, it is desirable to show an intention that the original debt shall be kept alive (**1410**) for the protection of the new mortgagee, or of a purchaser of the estate, against mesne incumbrances. The benefit of the debt, however, passes by the transfer of the estate (*o*), for it is only by payment of the debt that the estate can be taken from the

(*m*) Doe *d.* Maslin *v.* Roe, 5 Esp. 105.
(*n*) Sumpter *v.* Cooper, 2 B. & Ad. 223.
(*o*) Per Sir W. Grant, Jones *v.* Gibbons, 9 Ves. 411.

transferee; as, on the other hand, if a debt be assigned, and the assignment refer in terms to the security for it, the benefit of that security will also pass (*p*).

Of Legal Mortgages of Real and Chattel Real Estate.

11. In the legal mortgage of land, either for the whole freehold interest or for a term of years, and whether the term be created for the purpose of the security (*q*), by a mortgagor seised of the fee simple, or constitute his only interest in the estate, the property is conveyed or assigned by the mortgagor to the mortgagee, in a form like that of an absolute legal conveyance, but subject to a proviso or condition by which the conveyance is to become void, or the estate is to be reconveyed, upon repayment to the mortgagee of the principal sum secured, with interest, on a certain day, which is usually at the end of six months or some other short period after the date of the security. Upon the nonperformance of this condition, which in practice is seldom or never performed, the mortgagee's conditional estate becomes absolute at law, but remains redeemable in equity during a certain period (**463**, **487**) under the rules imposed by Courts of Equity and by statute. It is also usual to insert a covenant to repay the principal upon the day fixed for repayment in the proviso for redemption, and to pay interest in the meantime, together with other provisions to be hereafter noticed, but none of these are necessary parts of a mortgage (**1321**).

12. There are besides other forms of legal mortgage which are now but little used. One of these is the Welsh mortgage,

(*p*) Per Sir G. Rose, Ex parte Smith, re Mannings, 2 D. & C. 271.

(*q*) The practice for owners of the fee to mortgage for a long term of years was originally adopted to avoid the liability or supposed liability of the estate, after condition broken, to dower and other legal charges upon the estate of the mortgagee; a reason which has long since ceased. The mortgage for a term has the advantage of keeping together the estate and the debt when the mortgagee dies intestate, but of course he can only acquire an absolute interest in the term by foreclosure, and can assign no more upon a sale; and the reversion, which remains in the owner of the estate, carries the right to the possession of all deeds relating to the inheritance. The plan is still necessarily adopted where money is raised by trustees of a term, under a will or settlement, but in securities made by the owner of the fee it has almost fallen into disuse.

by which the estate is conveyed absolutely to the creditor without condition, the rents and profits being enjoyed by him in lieu of interest (*r*). There is no covenant, express or implied, for payment, and no right to sue for a debt, though on failure in payment, upon any particular day which may be named for payment, there may be a right to bring ejectment, and as in other mortgages a debt is implied for the purpose of adjusting the equities between the real and personal estates of the mortgagor (*s*) (**1322**).

This kind of security differs much in its consequences, as well as in its form, from the common mortgage, because it carries a right to redeem but none to foreclose, for being without condition there can be no forfeiture (*t*), and it is only after forfeiture that the mortgagor's right is barred by foreclosure (*u*). The possession of the mortgagee is of the very essence of the Welsh mortgage, and every receipt of rent is a receipt by virtue of the contract of so much interest. Hence a Welsh mortgage was held to be redeemable under the old law of limitation, until the lapse of twenty years from the time when the mortgage was fully satisfied (*x*); and in this particular it seems that the modern Statute of Limitations (3 & 4 Will. 4, c. 27) has made no difference (**498**).

13. Sometimes the contract differs in form from the common Welsh mortgage, as by a stipulation that the mortgagee shall repay himself both principal and interest out of the rents and profits. But it seems that if such a contract have the principal requisites, it will also have the effect of the common Welsh mortgage (*y*); and the presence of a covenant to pay the principal and interest on demand is not (*z*) such a limitation

(*r*) "It was said to be a common practice in Wales to make mortgages in this manner, with design to keep the estate for ever in their own family." (Pre. Ch. 425.)

(*s*) Howell *v.* Price, Pre. Ch. 423, 477.

(*t*) Balfe *v.* Lord, 2 Dru. & War. 480.

(*u*) Bonham *v.* Newcomb, 1 Vern. 232. An equitable mortgagee may often foreclose though there be no actual forfeiture, and even no condition (**953**). But this is by analogy, the equitable mortgagee being entitled to call for and to have the same remedy as if he had obtained a legal mortgage.

(*x*) Yates *v.* Hambly, 2 Atk. 363; Longuet *v.* Scawen, 1 Ves. 403; Fenwick *v.* Reed, 1 Mer. 125.

(*y*) Orde *v.* Hemming, 1 Vern. 418.

(*z*) Teulon *v.* Curtis, Younge, 610.

of the time for payment as to lead to forfeiture, and so to let in foreclosure. But if there be such a covenant, and no stipulation for the receipt of the rents and profits by the grantee, the security will not have the character of a Welsh mortgage, the presence of the stipulation and the absence of a condition being alike necessary to every form of that security. And unless the terms of the instrument exclude such a construction, the presumption will be that the deed was meant to operate as an ordinary mortgage. This presumption will be strengthened if the debt be also secured by bond and judgment (*a*); for it would be absurd to suppose that the person, and any other property of the debtor, should be liable to be taken for the debt, and not the estate which was specifically pledged for its payment (*b*).

(*a*) Balfe *v.* Lord, 2 Dru. & War. 480. In O'Connell *v.* Cummins, 2 Ir. Eq. Rep. 251, a demurrer was allowed to the mortgagee's bill, the proviso for redemption being for payment at any time: which was considered to be of the nature of a Welsh mortgage.

(*b*) Ancient authorities disagree as to the reason why the word *mortuum* was applied to distinguish a particular form of the *vadium* or pledge. According to Glanvill, a pledge is called *mortgage*, when the fruits or rents, which are received, go in reduction of the demand. (Lib. 10, c. 6.) And again, he says (c. 8), when an immoveable thing is put in pledge, and seisin of it has been delivered to the creditor for a definite term, it has either been agreed between the creditor and debtor, that the rents shall in the meantime reduce the debt, or that they shall not be so applied. The former agreement is just and binding; the other, unjust and dishonest, and is that called a *mortgage*. But Littleton (s. 332), after describing the *mortuum vadium* as a feoffment, upon condition that if the feoffor pay the money to the feoffee at a certain day, the feoffor may reenter, says, it is called *mortgage*, for that it is doubtful whether the feoffor will pay at the day limited; and if he doth not pay, then the land is taken from him for ever, and so dead to him upon condition, &c.; and if he doth pay, then the pledge is dead as to the tenant in mortgage. To which Lord Coke adds the further reason, that it is to distinguish it from *vivum vadium*. As if a man borrow £100 of another, and maketh an estate of lands unto him, until he hath received the said sum of the issues and profits of the land, so as in this case neither money nor land dieth or is lost, and therefore it is called *vivum vadium*. *Vivum vadium* in both cases is correctly described, but the *mortuum vadium* of Glanvill was not that of the later writers, who probably invented or adopted an explanation suitable to the altered form of the security; as applied to which, the definition of Glanvill would have been unintelligible. His *mortuum vadium* seems to have been like the Welsh mortgage (which also resembled the *pactum antichreseos* of the Roman law, Colquhoun, R. C. L. § 1497), rather than the common law mortgage spoken of by Littleton; the mortgage in the nature of a Welsh mortgage being analogous to the *vivum vadium*. We may perhaps infer from

14. The absence in a common mortgage of the covenant for payment of the debt, does not however of itself affect the transaction as a mortgage; though it has been thought to be material where the absence of the covenant may be explanatory of the intention of the parties. Thus, in the case of a lease by the mortgagee to the mortgagor for a long term, at a rent, with a proviso for re-conveyance if the mortgage money and interest were paid within three years, the absence of a covenant for repayment of the mortgage money was held to show that after the three years the interest was to be irredeemable, and that the intention was to purchase the interest absolutely by way of rent-charge; and the transaction, being fair, and

the contents of an Anglo-Saxon deed of the tenth century, that a security resembling the ancient *mortuum vadium*, and possibly derived from the *pactum antichresecos*, was used in England at that time. It appears from this document that land was delivered by Sigelm, the father of Eadgifa, queen of Eadward the elder, in pledge for £30 to Goda, who held it for seven years. Sigelm having paid off the debt, and bequeathed the land to Eadgifa, was afterwards slain in battle, and Goda then denied having received the money, and for six years withheld the land. Eadgifa purged her father by oath as to the payment, but could not recover the land without the interference of the reigning king; and after being again despoiled of it, and a second time regaining it, she bestowed it upon the Church. (See Lye's Anglo-Sax. Dict. vol. 2, Appendix, No. 4, Ed. 1772.) Assuming the authenticity of this document, it shows that possession of the land was delivered, and that the right of redemption was admitted after seven years; and it seems to be implied that no reduction of the debt had taken place, by reason of the mortgagee's possession. In *Domesday* the mention of lands in mortgage seems to imply the possession of the mortgagee (see Domesday for Essex, fols. 157, 158, 167, Marsh.); and if, as is possible, the alleged mortgages were only pretences to cover acts of spoliation against the former owners, it is still more clear, that the possession of the mortgagee was then incidental to the security; as it was also in the time of Glanvill, when there could be no conveyance without livery of seisin.

The antichrèse of the Code Napoléon appears to partake of the nature both of the old *mortuum vadium* and of the *vivum vadium*. By it the creditor acquires a right over the enjoyment only of the estate, which, however, he may retain until payment of his whole debt. He must apply the profits annually in discharge of the interest first, and then of the principal of the debt, and is bound to account. In the absence of special agreement he pays the outgoings of the property, which it is also his duty to keep in repair, deducting these expenses from the produce. It seems that the extent to which the debt is to be discharged by the produce and the manner of paying it, may be the subject of particular agreement, but no agreement is permitted which will give the mortgagee an absolute interest in, or a right to sell, the estate, on default of payment at the appointed day, or otherwise than by the regular legal process. (Code Civil, 2085—2091.)

different from an attempt to fetter the redemption in the land itself, was upheld (*c*) (**488—491**). So a conveyance by a debtor to a trustee (the creditor being a party), in trust out of the annual proceeds to pay head rent and insurance premiums, and to pay creditors their principal and interest by instalments, and then to reconvey, and which contained no covenant for payment by the debtor, was held (*d*) not to be a mortgage entitling the creditors to foreclosure or sale; though if there had been such a covenant, the decision would probably have been otherwise.

15. And while the courts protect the *bonâ fide* purchaser against stale demands, or other pretences that only a mortgage was intended, they also take care that a borrower shall not suffer from the omission, in a deed or agreement, of the usual requisites of a mortgage, if those requisites have been omitted by positive fraud, by mistake or accident. Therefore, they hold that an instrument, which purports to be an absolute conveyance, may be controlled in its effect by another, which contains an express stipulation for redemption (*e*); or refers to the property as being in mortgage; or contains an agreement for a further loan (*f*); or by proof of payment of interest (*g*), or even (notwithstanding the Statute of Frauds), by parol evidence that the original contract was only made by way of security; for otherwise the statute would be made a cover for fraud (*h*).

So, where the deed purported to be an absolute assignment, but there was an erasure of a proviso which remained partly legible, and the erasure was not accounted for; the House of Lords held (*i*) that the instrument was a security, on the argument for the crown that there was no proof of payment of the consideration, than which the value of the estate was at least

(*c*) King *v.* King, 3 P. Wms. 358; Goodman *v.* Grierson, 2 Ba. & Be. 278; Mellor *v.* Lees, 2 Atk. 494; Floyer *v.* Lavington, 1 P. Wms. 268.

(*d*) Taylor *v.* Emerson, 4 Dru. & War. 117. See Holmes *v.* Matthews, 3 Eq. Rep. 450.

(*e*) Williams *v.* Owen, 10 Sim. 386.

(*f*) Sevier *v.* Greenway, 19 Ves. 413.

(*g*) Allenby *v.* Dalton, 5 L. J., Ch. 312.

(*h*) Gordon *v.* Selby, 11 Bli., N.S. 351; Lincoln *v.* Wright, 4 De G. & J. 16; 5 Jur., N. S. 1142; and see Douglas *v.* Culverwell, 8 Jur., N.S. 29.

(*i*) Att.-Gen. *v.* Crofts, 4 Bro. P. C. 136.

four times greater; and that the grantor had continued in possession, had made leases, and exercised other acts of ownership; although upon an issue the jury had found that the deed was duly executed, and though at first designed for a mortgage, had been afterwards altered to an absolute purchase. Again, if the deed contain a trust for sale on nonpayment of the consideration money by a day named, a redeemable interest is inferred to have passed (*k*), though there be no proviso for redemption, but only for re-conveyance on payment of the principal and interest.

The disproportion of value is not however of itself a reason for construing an instrument as a mortgage, but only where there were other circumstances tending to the same conclusion (*l*); though on the ground of excess of value, it was adjudged in an early case, that a release of an equity of redemption was made on a further trust, and did not bar the right of redemption (*m*).

So, if a mortgage were intended, but the mortgagee omit to insert the proviso for redemption, the mortgagor being a marksman, or if the mortgage were intended to be made by way of absolute conveyance and defeasance, but the grantee never executed the latter, the grantor is allowed to show the mistake (*n*). And a mortgage may be created by a deed duly executed, though it be retained by the debtor without communication with the creditor, unless it be shown that there was fraud in the execution, or that it was delivered as an escrow, and intended to operate conditionally (*o*).

16. But Courts of Equity will not lightly infer an intention to make a mortgage, where none is expressed, especially where possession has gone with the conveyance, and there has been a long acquiescence. Hence a covenant by the grantor, not

(*k*) Bell *v.* Carter, 17 Beav. 11; 17 Jur. 478.

(*l*) Douglas *v.* Culverwell, 3 Gif. 251; 8 Jur. N. S. 29; see Lord Nottingham's judgment in Thornborough *v.* Baker, 3 Sw. 631. So in the case of an annuity, M'Ghee *v.* Morgan, cited 2 Sch. & Lef. 395, disapproving of Heathcote *v.* Paignon, 2 Bro. C. C. 167.

(*m*) Morley *v.* Elways, Ca. in Ch. 107.

(*n*) 3 Atk. 389; Maxwell *v.* Mountacute, Pre. Ch. 526; Card *v.* Jaffray, 2 Sch. & Lef. 374.

(*o*) Exton *v.* Scott, 6 Sim. 31.

to make partition without the advice and consent of the grantee, has been held (*p*) not to turn a conditional sale into a mortgage.

17. A memorandum on the deed, signed by the mortgagee (*q*), is sufficient to set it up as a security; and so are written accounts of the receipt and payment of interest, kept by the grantee under an absolute conveyance, there being also parol evidence to explain the omission of the usual requisites of a mortgage (*r*).

The memorandum may also be signed so as to bind the grantee or transferee, by his agent, if the agent's authority can be proved by, or inferred from, sufficient evidence. Thus the authority of the wife of a transferee, who had signed an indorsement on the bill of sale of a ship, declaring it to be a mortgage, was admitted, and the signature was held to be the mortgagee's act (*s*), upon evidence that the mortgagee himself had given a receipt for interest on the consideration money.

Where a *feme covert* granted an irredeemable annuity, out of her separate life interest in a fund, she was held entitled to redeem on the ground that there was an intention, though none was expressed, against anticipation; and that though she might have raised a loan, it was too large an anticipation to do it by way of annuity (*t*).

18. Notwithstanding the readiness of Courts of Equity in certain cases to construe absolute conveyances as mortgages, they admit the validity of a sale with a proviso for repurchase, limited to be void upon the nonperformance of a certain condition, it being clear that if an absolute sale be really intended, an agreement made at the same time for a repurchase, and not

(*p*) Cottrell *v.* Purchase, For. 61.

(*q*) Franklyn *v.* Ferne, Barn. Ch. 30. The report states that it was the mortgagor's signature, but this is a misprint, or the memorandum was signed by both parties. On the question of costs, the report proceeds thus:—"Now as to that the judge was pleased to say that he thought it would be going too far to make Josiah (the mortgagee) pay the costs of this suit; but, on the other hand, his opinion was, that Josiah had forfeited his costs. In the first place here is an indorsement under his own hand, whereby he has admitted the assignment to be a mortgage; and, in the next place, here is a witness falsifying his answer."

(*r*) Cripps *v.* Jee, 4 Bro. C. C. 471.

(*s*) Whitfield *v.* Parfitt, 15 Jur. 852.

(*t*) Caverley *v.* Dudley, 3 Atk. 541.

acted upon, will not of itself entitle the grantor to redeem (*u*). The question to be considered is, whether the contract was in its nature a mortgage under the form of a sale, or a *bonâ fide* purchase, subject to a contract for repurchase (*x*). And the test of this is the reciprocity and mutuality of the remedies (*y*). For as on the one hand, where the grantee has the usual remedies of a mortgagee, the deed may be inferred to be only a security, so on the other, in the entire absence of those remedies (assuming that there was no fraud or mistake), no new clause for repurchase will confer upon the grantor a right to redeem, after the condition has been broken.

Now, the condition for repurchase, unlike the proviso for redemption, is construed strictly against the grantor; who, if he desire the benefit of it, must show compliance with its terms (*z*). And the reason of the difference is, that, in a mortgage, the penalty or forfeiture is introduced for the purpose of security only; and the mortgagee is compensated by receiving interest in default of payment of the principal at the time appointed. But in the case of a defeasible purchase, forfeiture is out of the question (the estate being absolutely vested in the grantee by the conveyance); and the power to repurchase, not being a right arising out of the nature of the contract, but a privilege given by special agreement, is to be exercised only on strict performance of the terms of the deed.

Therefore, where in one case it was agreed at the time of the conveyance (*a*), that the premises should be reconveyed by the purchaser on payment of the original consideration money, and the expenses of the conveyance, within a limited time; and in another (*b*), after an absolute release of the equity of redemption to the mortgagee, for a further sum, the

(*u*) See Verner *v.* Winstanley, 2 Sch. & Lef. 394, and the instances cited below.

(*x*) Mellor *v.* Lees, 2 Atk. 495.

(*y*) Goodman *v.* Grierson, 2 Ba. & Be. 274. See Alderson *v.* White, 4 Jur., N. S. 125; 2 De G. & J. 97; Tapply *v.* Sheather, 8 Jur., N. S. 1163; 7 L. T., N. S. 298; Shaw *v.* Jeffry, 13 Moo. P. C. C. 432.

(*z*) See 3 Sw. 631; Pegg *v.* Wisden, 16 Beav. 239; Barrell *v.* Sabine, 1 Vern. 268.

(*a*) Williams *v.* Owen, 10 Sim. 536 and 5 Myl. & Cr. 303; Acton *v.* Acton, Pre. Ch. 237; 2 Abr. Eq. Ca. 595; but see Waters *v.* Mynn, 14 Jur. 341.

(*b*) Davis *v.* Thomas, 1 Russ. & M. 506; Tam. 416; so in St. John *v.* Wareham, cited 3 Sw. 631.

mortgagee (being then in the position of a purchaser) demised the estate to the former mortgagor for a term, at a rent, and agreed at the same time that, upon punctual payment of the rent, the estate might be repurchased at a fixed price, and within a certain time; but in default of payment of the rent, the agreement was to be void:—it being clear in these cases that there was no mutuality, in other words, that the purchasers had no means of compelling the repayment of their consideration monies, but that the power of repurchase was a privilege only—redemption was refused in the first case after the period fixed had passed, and repurchase in the other within the period, but upon default of payment of the rent, though the arrears due were tendered with the purchase money. The strict condition has also been upheld where (*c*), upon the release of the equity of redemption for valuable consideration, it has been agreed that the mortgagee should reconvey upon repayment to him within a fixed time of the original mortgage money, with the consideration for the release and interest and the outlay for repairs or improvements; and where time was given for the payment of an existing debt upon security being given for payment of it by instalments, on the failure of any one of which the whole debt was to become payable (*d*). So if the mortgagee agree to forego part of his debt upon payment of the residue at a fixed day, prompt payment being the consideration for the agreement, equity will give no relief in case of default, but will hold the mortgagee entitled to the whole of his original demand (*e*), notwithstanding continued payments of interest on the lesser sum.

And so where the transaction is entirely carried out by the instrument of conveyance, if the grantee have no power of compelling the repayment, as upon a conveyance of a rever-

(*c*) Ensworth *v.* Griffith, 5 Bro. P. C. 184; Gossip *v.* Wright, 9 Jur., N. S. 592.

(*d*) Sterne *v.* Beck, 32 L. J., Ch. 682.

(*e*) Ford *v.* Earl of Chesterfield, 19 Beav. 428; see Thompson *v.* Hudson, L. R. 2 Ch. App. 255, where it was held upon the construction of complicated deeds, dissentiente Turner, L. J., that the original agreement to pay part of the debt and to give a mortgage for the residue, did not authorize the condition which was added to the mortgage, that on non-payment the creditors should be remitted to their original demand; and it was therefore treated as a penalty, and relief was given.

sionary interest in leaseholds (*f*), with a proviso for redemption upon repayment of the consideration money and interest within five years, but, in default, the estate of the grantee to be absolute and indefeasible, and the grantor to be debarred for ever from all right and relief in equity; and the grantor covenanted to release his equity. It seems clear that even these strong expressions of intention would not have availed, if any power of compelling repayment had been reserved to the grantee. And where (*g*) a mill, with the fixtures and business, were assigned to the equitable mortgagee thereof at a certain price (the business to be carried on by him), with a clause for resale within ten years, and a proviso that if the net profits of the business should not during six consecutive months at any period of the ten years produce such an amount as to pay the interest on the purchase-monies, and if the assignor should, within two months after notice, fail to pay the assignee the purchase-money, with interest, or in case the purchase-monies and interest should not be wholly repaid by the end of ten years, then the agreement for reconveyance should be void, and the equity of redemption barred; this was held to be a sale with a right to demand a resale, the grantee having acquired no personal rights against any one, and having no means, other than those pointed out by the deed (viz. the waiting the expiration of the time limited), for making himself master of the property.

Upon an agreement by one who had contracted to buy an estate, that it should be conveyed to a person who had advanced him part of the purchase-money, with a proviso to be void on repayment of the advances with interest, and of the whole amount of the purchase-money at a certain day, otherwise the sale to be absolutely confirmed to the lender, the transaction was also held to be a conditional sale (*h*).

It is the same if there be a conveyance of land, conditioned to be void on payment of a sum of money at a certain day; for it is in the election of the settlor either to pay the money

(*f*) Tasburgh *v.* Echlin, 2 Bro. P. C. 265.

(*g*) Ogden *v.* Battams, 1 Jur., N. S. 791.

(*h*) Perry *v.* Meddowcroft, 4 Beav. 197.

or to let the settlement stand, but not in that of the grantee to compel payment (*i*).

19. In determining whether an instrument is intended to operate as a mortgage, or as an absolute or conditional sale, the circumstances attending the transaction will be considered; and the facts that the grantee took immediate possession under the deed, and that the expenses of it were paid by him, contrary to the usual practice in cases of mortgage, will be some, but not conclusive, evidence of an intention of absolute sale (*k*). And circumstances of pressure upon the grantor, as where he is insolvent and in prison, or represented by the same solicitor as the grantee, will materially influence the court in construing an apparently absolute or conditional sale, as a mortgage, where, in the absence of such circumstances, the mere insufficiency of price would be little regarded. Weight will be also given to the circumstance, that, in the peculiar position of the grantor, a mortgage might be beneficial to him when a sale would not (*l*).

20. Somewhat akin to the case of a conditional sale is that of a condition in a settlement, that, upon payment of a sum of money in a certain event, the prior limitations of an estate shall cease, and the land go the person paying the money; as where (*m*) land was settled upon the issue of the intended marriage in tail, with a proviso that if there should be but one daughter, and no other child of the marriage, the land should be to the husband in fee, upon payment to the trustees of the settlement of a sum of money by his heirs, executors or administrators, within three months after his death. The event having happened, this was held to be only a security for money, and to be redeemable after the three months; and that, not merely by the heir or executor, but also by a

(*i*) King *v.* Bromley, 2 Abr. Eq. Ca. 595; and see Ensworth *v.* Griffith, 5 Bro. P. C. 184.

(*k*) Williams *v.* Owen, 10 Sim. 386; and 5 Myl. & Cr. 303; Davis *v.* Thomas, 1 Russ. & M. 506; nor will payment of the expenses by the grantor be conclusive evidence of an intended mortgage. (Alderson *v.* White, 4 Jur., N. S. 125; 2 De G. & J. 97.)

(*l*) Fee *v.* Cobine, 11 Ir. Eq. Rep. 406.

(*m*) Frederick *v.* Aynscombe, 2 Eq. Ca. Abr. 594, M. N.; 1 Atk. 392.

creditor of the husband. But it will be different (*n*) if the proviso be, that, unless (in the happening of the event) the person entitled under the limitation pay to another a certain sum within a limited time, the land shall go over to the latter in fee, for here there is a limitation over upon default of payment at the appointed day, to treat which as redeemable would destroy the distinction between a condition and a limitation over.

21. It follows from what we have seen of the nature of foreclosure, that in these cases of conditional sales and settlements, there being no power in the person to whom the money may be paid to compel payment of it, and no forfeiture, but a permissive right of payment only, there can be no foreclosure.

22. Another kind of redeemable interest is that in which the person to whom the consideration money is paid grants, not the estate, but an annuity or rent-charge issuing thereout, with a clause of repurchase. Transactions of this kind were originally made (where loans were intended) for the purpose of avoiding the Statutes of Usury, and are now of common occurrence. The effect of the transaction is somewhat of the nature of a Welsh mortgage, the money borrowed being repaid by instalments, consisting partly of interest and partly of principal (*o*) (**12**).

The tendency of the court is to treat annuities, thus granted with a power of repurchase, as redeemable annuities, and to admit unwillingly the distinction between redemption and repurchase in cases in which the grant of the annuity and the stipulation for repurchase form part of the same transaction; especially if the words "redemption" and "repurchase" appear to have been used synonymously; but the word "repurchase" will be construed with the strictness of a condition, where the grantee has been for some time in possession as purchaser (*p*).

The presence of a stipulation that notice shall be given of

(*n*) Earl of Winchelsea *v.* Norcliffe, 1 Vern. 430.

(*o*) Floyer *v.* Sherard, Ambl. 19; Lawley *v.* Hooper, 3 Atk. 281. But this seems to be the only resemblance, for possession is not of the essence of the transaction, and foreclosure may be had.

(*p*) Longuet *v.* Scawen, 1 Ves. 403; Bulwer *v.* Astley, 1 Ph. 422.

the intention to repurchase, and the condition for repayment of the purchase-money, with a further sum amounting to the value of the interest during the period of notice, are also circumstances (*q*) upon which the court will rely, as indications that a loan was intended, and that the object was to allow time to find another borrower, and to secure interest in the meantime; though the latter condition was one upon which Lord Redesdale thought that much stress ought not to be laid (*r*).

23. It may be shown, that a contract that a conditional sale should become absolute upon the happening of a certain event, was entered into by the grantor with the full knowledge of the consequences (*s*), and what was the nature of an instrument uncertain upon the face of it (*t*); but such evidence will not be allowed to affect an inference that the transaction, though in form a sale, was only a mortgage, where that inference is founded upon strong circumstances. Thus, where a debtor gave to his creditor an absolute bill of sale of a ship at sea, and deposited with him a policy of insurance thereon, and drew bills upon him for further sums, engaging but failing to pay them when they came to maturity, and the bills were renewed at the expense of the debtor, and the insurance was kept up and payments made by him on account of the crew: these facts were held to be consistent with, and evidence of, a mortgage, and not of a conditional sale intended to become absolute upon non-payment of the bills, although parol evidence was given by the creditor that the agreement was otherwise (*u*).

24. A legal mortgage of a copyhold estate is effected by a surrender of the copyhold, with a condition that the surrender shall be void upon payment of the money at the day fixed. When the copyhold only forms part of the security the surrender is usually made in pursuance of a covenant to surrender (*x*), contained in the accompanying mortgage of the

(*q*) Lawley *v.* Hooper, 3 Atk. 281; Bulwer *v.* Astley, 1 Ph. 422.

(*r*) Verner *v.* Winstanley, 2 Sch. & Lef. 393.

(*s*) Newcomb *v.* Bonham, 1 Vern. 8, 214, 232.

(*t*) Langton *v.* Horton, 5 Beav. 9.

(*u*) Langton *v.* Horton, 5 Beav. 9.

(*x*) The interest of the covenantee under such a covenant may be assigned, and the assignee will be entitled to admittance on payment only of a single fine, even though the agreement to assign be presented by the homage. (The

freehold or leasehold estate, and the covenants for title in which are made to extend to the copyholds, or, if there be no such other security, the covenants for payment and title, if made, are alone contained in a separate deed. Until presentment and entry upon the court rolls of the conditional surrender, nothing passes by it (*y*); but these acts being completed, the mortgagee generally abstains from taking admittance until it becomes necessary or desirable to do so, and in the meantime the fines and fees which would become payable upon his admittance are saved, and he does not become subject to the liabilities incident to copyhold tenancy. His interest, in fact, until admittance, is merely equitable, the surrenderor remaining seised of an estate which is descendible to his heir (even though the lord have accepted rent from the surrenderee (*z*)), and being liable to the lord both for services and for the purpose of forfeiture (*a*). Nor can the lord, except by special custom, compel the mortgagee to take admittance either before or after condition broken (*b*), though if by custom the lord may insist upon it and a forfeiture be incurred, there will be no relief in equity against the forfeiture (*c*).

25. Upon breach of the condition and admittance of the surrenderee, his estate becomes absolute; and having already before admittance acquired a good title as against all but the lord, he takes upon admittance a title which relates back to the date of the surrender; so that he may recover in ejectment against a purchaser who has taken admittance under a later surrender (*d*).

26. The lord is not bound to accept a conditional surrender which is embarrassed with trusts, unless it be warranted by

King *v.* Lord of the Manor of Hendon, 2 T. R. 484.)

(*y*) Burgaine *v.* Spurling, Cro. Car. 283; Frosel *v.* Welsh, Cro. J. 403; Fawcet *v.* Lowther, 2 Ves. 303.

(*z*) Frosel *v.* Welsh, Cro. J. 403.

(*a*) Doe *d.* Shewen *v.* Wroot, 5 East, 132; Floyd *v.* Aldridge, cited id. 137; The King *v.* Mildmay, 5 B. & Ad. 254; Pow. Mort. 433 a, note, ed. 6; 2 Watk. Cop. 117. See Fawcet *v.* Lowther, 2 Ves. 303; Minton *v.* Kirwood, L. R. 1 Eq. 449.

(*b*) Watk. Cop. 1, 148, n.

(*c*) Tredway *v.* Fotherley, 2 Vern. 367; Scriven, Cop. 1, 195.

(*d*) Holdfast *d.* Woollams *v.* Clapham, 1 T. R. 600; The King *v.* Mildmay, supra; Benson *v.* Scott, 12 Mod. 49; Doe *d.* Wheeler *v.* Gibbons, 7 Car. & P. 161.

custom, or to recognize persons over whom he has no control, or give effect to a transaction to which he is not a party. He may therefore refuse a surrender made subject to such uses as the surrenderee shall appoint by writing, though if he have accepted such a surrender he will be bound by it (*e*). And he must admit an appointee under a power created by will.

27. Copyholds for lives are also usually mortgaged by way of conditional surrender, although in strictness the surrender of such copyholds, except under a special custom, is a renunciation of the copyhold estate for the lord's use, without any obligation upon him to regrant it; so that on admittance the tenant would take from the lord and not from the surrenderor, as in the case of copyholds of inheritance (*f*).

28. In mortgaging leaseholds for years it is usual, instead of assigning the whole term to the mortgagee, to grant him an underlease, reserving to the mortgagor a few days or some other nominal reversion out of the original term; because if the whole of that term be legally vested in the mortgagee, he becomes liable as assignee to be sued by the lessor on the lessee's covenants, whether the mortgagee have or have not entered into possession of the estate (*g*); though it was formerly thought, that until entry and possession, an assignment by way of mortgage was on a different footing in this respect from an absolute assignment (*h*).

Even though the security have been of no value to the mortgagee, he will not be relieved in equity against the action of the lessor (*i*); who, on the other hand, will be left to his legal remedy and will not be assisted to charge the mortgagee (*k*).

(*e*) Eddleston *v.* Collins, 3 De G., M. & G. 1; Flack *v.* Master, &c. of Downing College, 13 C. B. 945.

(*f*) Watk. Cop. 1, 51, note (1). In mortgages of estates for lives, whether copyhold or leasehold, it is usual by way of further security for the mortgagor to insure the lives of the *cestuis que vie*. But where money is raised by the direction of the Court of Chancery upon such property, the court has no power to compel the persons entitled to insure the lives. (Grantley *v.* Garthwaite, 6 Mad. 96.)

(*g*) Williams *v.* Bosanquet, 1 B. & B. 238; 3 Moore, 500; Stowe *v.* Evans, Peake, Add. Ca. 94; Haig *v.* Homan, 4 Bli. N. S. 380.

(*h*) Eaton *v.* Jacques, 2 Dougl. 455. See also Walker *v.* Reeve, 3 Dougl. 19.

(*i*) Pilkington *v.* Shaller, 2 Vern. 374.

(*k*) Sparkes *v.* Smith, 2 Vern. 275.

The liability to the covenants, being thus dependent upon the legal ownership, attaches neither to the mere equitable interest of a devisee or other assignee of the estate of the mortgagor, nor to that of an equitable mortgagee (*l*); nor has the lessor any equity to compel the equitable assignee or depositee, between whom and himself there is no privity, to take a legal assignment so as to make himself liable to the covenants; even though the equitable assignee have taken possession of the property; the effect of the possession being dependent upon the nature of the title under which it is taken (*m*).

Of Mortgages of Chattels Personal.

29. Personal chattels may be the subject of securities, for the validity of which no deed or writing is necessary (*n*); and which may be made either by way of mortgage, or by pledge.

A mortgage of chattels, which, like an absolute assignment of them, is commonly called a bill of sale (**78**), passes the actual property in the goods to the mortgagee, subject to redemption. Like other mortgages it may be made subject to a condition; and the possession of the creditor is not, as in the case of a pledge (**97**), necessary for its validity (*o*). But as it is fraudulent by the rules of law (*p*) for the debtor to continue in possession of the goods mortgaged, because he is thereby invested with a delusive credit arising out of such possession, it was held in *Twyne's case* (*q*), soon after the passing of the statute against fraudulent deeds and alienations, that such possession was within the mischief aimed at by that act (**346**). It is therefore a rule (*r*), that where goods mortgaged are capable of delivery, there ought to be an actual delivery of

(*l*) Mayor of Carlisle *v.* Blamire, 8 East, 486.

(*m*) Moores *v.* Choat, 8 Sim. 508, overruling Flight *v.* Bentley, 7 id. 149; Moore *v.* Greg, 2 De G. & S. 304; 2 Ph. 717, overruling Lucas *v.* Comerford, 3 Bro. C. C. 165; 1 Ves. J. 235.

(*n*) Litt. s. 365; Reeves *v.* Capper, 5 Bing. N. C. 136; Flory *v.* Denny, 7 Exch. 581.

(*o*) Maugham *v.* Sharpe, 17 C. B., N. S. 443; 10 Jur., N. S. 989.

(*p*) Per Lord Hardwicke, 1 Atk. 167.

(*q*) 3 Co. 80.

(*r*) Per Sir Thomas Parker, C.B., in Ryall *v.* Rolle, 1 Atk. 176; and see Lempriere *v.* Pasley, 2 T. R. 485, as to mortgage of goods at sea.

them; but if the mortgagee cannot obtain possession either of the goods, or of such documents or muniments as will give him the dominion over them, he must give notice of his title to the person who has the dominion (**1086**).

A provision that the mortgagor of goods shall remain in possession until default operates as a re-demise by the mortgagee, who cannot sue for the goods until default has been made or until the expiration of the time limited after notice, where notice for payment is to be given upon default; and the mortgagor may maintain an action for interference with his possession during the term. But the re-demise only entitles the mortgagor to the *use* of the chattels; if he or his assignees in bankruptcy sell them during the term, it will be a disclaimer of the tenancy, and the mortgagee or his assignees may bring trover for the conversion (*s*).

30. It is not necessary for the validity of a mortgage of chattels that the mortgagor should be aware of their exact nature (*t*). He may even create a valid security upon personal property not yet in existence, provided he have a potential interest in that out of which the property may arise. Therefore, a parson may grant all the tithe wool which he may have in such a year, though perhaps he shall have none; and one possessed of land, the fruits which shall arise upon it; and the property shall pass as soon as the fruits are extant. But a man cannot grant the wool that shall grow upon his sheep that he shall buy hereafter, for that he hath it neither actually nor potentially (*u*). So in equity, and possibly, on the principle of a potential right, at law also, a valid mortgage may be made of the produce to arise from a whaling voyage then in course of prosecution (*x*), although, for want either of an actual or potential interest, an assignment of the profits of a ship has been held not to pass at law the oil obtained on a voyage which was not contemplated at the date of the assignment (*y*).

31. An incomplete chattel may also be the subject of a

(*s*) Fenn *v.* Bittleston, 7 Exch. 937; Brierley *v.* Kendall, 17 Q. B. 937.

(*t*) Ex parte Kelsall, De G. 352.

(*u*) Grantham *v.* Hawley, Hob. 132; Petch *v.* Tutin, 15 M. & W. 110.

(*x*) Langton *v.* Horton, 1 Hare, 549.

(*y*) Robinson *v.* Macdonnell, 5 Man. & S. 228.

security comprising a contract to complete it, and to assign the materials appropriated for its completion, and the chattel when finished; and by such a contract the entire chattel and all things prepared for, though not actually attached thereto, will be bound, and will vest in the assignee (*z*) (351).

32. But a mere grant of goods not in existence, or not then belonging to the grantor, is inoperative at law, unless the grant be ratified by the grantor after he has acquired the property (*a*); such a ratification being sufficiently shown where the grantee takes possession of the after-acquired property, with the consent of the grantor (*b*). Otherwise a security upon such property can be created at law only by a licence or authority to the creditor to take possession of it; by which licence, so long as it remains unacted upon, no title to any specific property is created; but when executed the mortgagee's title is as good, to the extent of the property taken, as if he had been directly put into possession by the mortgagor himself (*c*). And an instrument, though plainly intended to take effect as an assignment, and void as such, may, if it contain apt words, be treated as a power to take possession of the after-acquired property. A security was so construed, which provided that after-acquired property should belong to the creditor, and be considered to be included in the assignment as fully as if it were the property of the debtor, and included in the deed, so that the security might at all times be of adequate value (*d*).

A subsequent assignment by the mortgagor, when the after-acquired property has come into his possession, and before it has been seized by the first mortgagee under the licence, amounts to a revocation of the licence (*e*).

33. In equity, on the other hand, upon the principle that specific performance would be decreed of a contract to assign, when property which answers the description in the contract

(*z*) Reid *v.* Fairbanks, 1 C. L. R. 787; Woods *v.* Russell, 5 B. & Ald. 942.

(*a*) Swan *v.* Thornton, 1 C. B. 379; Gale *v.* Burnell, 7 Q. B. 850.

(*b*) Hope *v.* Hayley, 5 El. & Bl. 830.

(*c*) Congreve *v.* Evetts, 10 Exch. 298; Holroyd *v.* Marshall, 2 Sm. & G. 382; 7 Jur., N. S. 319; 10 H. L. C. 191. See Belding *v.* Read, 11 Jur., N. S. 547.

(*d*) Hope *v.* Hayley, 5 El. & Bl. 830.

(*e*) Carr *v.* Acraman, 11 Exch. 566.

comes into the possession of the mortgagor, an assignment of chattels not in the mortgagor's possession at the date of the assignment will pass an immediate interest, which will attach upon the chattels when they are acquired (*f*); and a licence under which in ordinary cases no interest would pass until the chattels were seized by virtue of it, may, upon the construction of the instrument in which it is contained, operate as a present assignment (*g*).

34. Questions whether and to what extent securities upon chattels were intended to affect more than the present property of the grantor, most frequently arise in mortgages of furniture and stock in trade, and of the machinery and fixtures contained in manufactories; the chattel or other nature of which latter has also been the cause of much discussion.

In considering these questions, it may be premised that, where property is purely of a moveable nature, a clear intention must be expressed or implied in the security to affect such as is subsequently acquired or brought upon the mortgaged premises. Such an intention has been held to arise on a mortgage of farming stock and of the mortgagor's tenant right and interest yet to come and unexpired in the farm and premises, which latter words were held to include the tenant's interest in crops grown in future years of the term, as that which the tenant but for the security would have a right as tenant to collect during the term (*h*),

But it is otherwise in the case of a mortgage of furniture or chattels in a house, with power for the mortgagee on default to enter and take all and every the goods, chattels, effects and premises (*i*), for none of these words point to future property; of course, also, where the security is expressly confined to property then being on the premises (*k*).

35. A different consideration arises where the property though chattel is either absolutely or in a qualified manner fixed to the freehold.

(*f*) Holroyd *v.* Marshall, supra; Reeve *v.* Whitmore, 9 Jur., N. S. 243, 1214; 33 L. J., Ch. 63.

(*g*) Reeve *v.* Whitmore, supra.

(*h*) Petch *v.* Tutin, 15 M. & W. 110.

(*i*) Tapfield *v.* Hillman, 6 M. & G. 245; 6 Scott, N. R. 967.

(*k*) Ex parte Stephenson, 12 Jur. 6.

Whatever is fixed to the land, or to the building which stands upon it, belongs to the land; and though this rule has been so far relaxed for the benefit of trade, that as between landlord and tenant certain fixtures may be removed by the tenant during the term, the exception is confined to cases arising out of that relation, and does not apply where the person who annexes the fixtures is the owner of the soil, whether he acquired it by descent or by purchase, and whether he annexed the fixtures for the better enjoyment of the land or for the purposes of trade or manufacture (*l*).

Therefore, as a general rule, by the mortgage of land or of a mill or other building, not only all fixtures annexed to it at the date of the security (*m*), but also all those which are afterwards annexed by the mortgagor, whether they be or be not such as are removeable as between landlord and tenant (*n*), will vest in the mortgagee though the mortgagor continue in possession, and will not pass to the assignees in bankruptcy of the latter (*o*); and this consequence will follow, independently of any inference as to the non-ownership of the bankrupt arising from the custom of a particular trade that the fixtures shall be furnished by and continue to be the property of the owner of the land (*p*). It is no ground of objection to this rule that the fixtures were erected by a partnership firm, to one member of which the mortgaged property exclusively belonged, the mortgagee not being concerned with the equities between the partners (*q*).

36. The general rule is, however, subject to qualifications arising out of the terms of the security. Where fixtures are specially mentioned as part of the security, they may be so mentioned as to raise an inference that it was confined to those

(*l*) Fisher *v.* Dixon, 12 Cl. & Fin. 312; Mather *v.* Fraser, 2 K. & J. 536.

(*m*) Place *v.* Fagg, 4 M. & R. 277; Ex parte Bentley, 2 M., D. & De G. 591, where trade fixtures passed under the word "appurtenances."

(*n*) Walmsley *v.* Milne, 6 Jur., N. S. 125; 7 C. B., N. S. 115; Ex parte Reynal, 2 M., D. & De G. 443; M'Cluney *v.* Lemon, Hayes, 154; Ex parte Belcher, 4 D. & C. 703; Ackroyd *v.* Mitchell, 3 L. T., N. S. 236.

(*o*) Clark *v.* Crownshaw, 3 B. & Ad. 804.

(*p*) See Rufford *v.* Bishop, 5 Russ. 346.

(*q*) Ex parte Scarth, 1 M., D. & De G. 240; Ex parte Cotton, 2 id. 725; Cullwick *v.* Swindell, L. R., 3 Eq. 249.

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which existed at its date, or such as have been afterwards annexed may be excluded by subsequent dealings between the parties. As if two kinds of property be mortgaged, with the fixtures in one of them, the principle *expressio unius est exclusio alterius* will exclude the fixtures annexed to the other. For instance, a mortgage (*r*) of a foundry and of dwelling-houses, with the bells and other fixtures in the houses, was held to exclude a steam engine and machinery in the foundry, which otherwise would clearly have passed by the mere conveyance of the foundry; but the bare enumeration of specific fixtures in the mortgaged property will not rebut the inference that all fixtures were intended to pass (*s*).

Again, if it be the custom of the place that fixed machinery which can be removed without injury to the freehold is commonly so removed, and it has been treated between the parties as separate from the land and unaffected by the mortgage, such machinery may be held not to pass (*t*) by a mortgage of the buildings and machinery; but this distinction is admitted with great caution, and was held not to have arisen by a mere mortgage of a factory to one followed by a separate mortgage of the machinery contained in it to another (*u*).

37. The rule as to the vesting of fixtures in the mortgagee of the buildings or soil to which they are annexed, extends to mortgages of leasehold as well as of real estate (*x*); and the right of the mortgagee to fixtures both existing and added, and whether removeable or not as between landlord and tenant, and whether the property be real or leasehold, arises under an equitable mortgage by deposit (**42**), as well as under a legal mortgage, and whether the deposit be or be not accompanied by a memorandum of agreement (*y*). Where a deposited

(*r*) Hare *v.* Horton, 5 B. & Ad. 715.

(*s*) Mather *v.* Fraser, 2 K. & J. 536; and for the effect of words relating to machinery to be added, see Metropolitan, &c. Society *v.* Brown, 26 Beav. 454; Haley *v.* Hammersley, 7 Jur., N. S. 765.

(*t*) Trappes *v.* Harter, 2 Cro. & M. 153; and see Waterfall *v.* Penistone, 3 Jur., N. S. 15; 6 El. & Bl. 876.

(*u*) Whitmore *v.* Empson, 23 Beav. 313; 3 Jur., N. S. 230.

(*x*) Langstaff *v.* Meagoe, 2 Ad. & E. 167; Ex parte Broadwood, 1 M., D. & De G. 631; Ex parte Barclay, 5 De G., M. & G. 403.

(*y*) Ex parte Price, 2 M., D. & De G. 518; Ex parte Barclay, 5 De G., M. & G., 403; Ex parte Cowell, 12 Jur. 411; Ex parte Broadwood, supra; Ex

lease having expired, an agreement was made for a new lease which was not granted, the security was held to remain on the produce of the fixtures (*z*). And the right of the mortgagee of a lessee to sever the mortgaged fixtures from the freehold is a right or interest within the rule laid down by Lord Coke (*a*), as to a surrender of a lease: that "having regard to the parties to the surrender, the estate is absolutely drowned. But having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in law a continuance." The mortgagee may therefore enter and sever the fixtures notwithstanding the surrender of the term (*b*).

38. As to the extent of the term "fixtures"—whatever is of itself sunk or is built into any fabric which is sunk into the ground, or is fixed by cement, screws, solder or other permanent fastening to any such fabric, or to any part of the building itself, either above or below, and although it may be removed without injury to the building, is considered to be annexed to the land. Such may be a steam engine, steam hammer, engine boiler, cross shafting in a factory, furnace of fire brick and iron, coke oven, still, malt mill, gas fittings, and other fixed machinery (*c*); but a bed plate only laid upon and not fixed to a foundation sunk in the ground, cutters kept in place by wedges, cisterns, and generally such articles as are kept in place by their own weight only, though resting upon foundations fixed to the soil, do not pass (*d*).

Neither do such articles pass, as, though partly imbedded in the soil, have not been so placed in order to fix them, as for instance straightening plates, which have accidentally pene-

parte Tagart, De G. 531; Ex parte Heathcoat, Fonbl. N. R. 42; Ex parte Edwards, id. 208; Williams *v.* Evans, 23 Beav. 239.

(*z*) Fearenside *v.* Derham, 13 L. J., N. S., Ch. 354.

(*a*) Co. Lit. 378 b.

(*b*) London and Westminster Loan and Discount Company *v.* Drake, 5 Jur., N.S. 1407.

(*c*) Mather *v.* Fraser, 2 K. & J. 536; Haley *v.* Hammersley, 7 Jur., N. S. 765; Walmesley *v.* Milne, 6 Jur., N. S. 125; 7 C. B., N. S. 115; Metropolitan, &c. Society *v.* Brown, 26 Beav. 454; 5 Jur., N. S. 378; Horn *v.* Baker, 9 East, 215; Ackroyd *v.* Mitchell, 3 L. T., N. S. 236.

(*d*) Metropolitan, &c. Society *v.* Brown; Mather *v.* Fraser, supra.

trated the ground, or sleepers and trams which have become sunk into it by the weight of waggons passing over them (*e*). Nor yet looms, the legs of which are dropped into sockets in the floor of the mill for steadiness only; for besides that they are unfixed and no part of the mill, they are also in the nature of mere furniture, liable to be changed according to the purpose to which the mill and the fixed machinery in it may from time to time be applied (*f*).

39. Moreover, with any fixture will pass (*g*), without special mention, whatever, though accidentally detached from it, or not of its own nature a fixture, may be essential for the proper employment of the machine or fixed article of which it forms part, even though it be more or less capable of use in a detached state. Such may be the stone of a mill removed for the purpose of repair, or the anvil of a steam hammer, and the same rule is applicable in the case of machinery not of a fixed kind; so that by a mortgage of looms and other effects belonging thereto (*h*), will also pass the healds, reeds and other fixed adjuncts, without which, though they are separate from and are not always sold or supplied with the looms, the latter are unfit for weaving.

And a mortgage of a ship at sea with its tackle and appurtenances will pass a chronometer then on board belonging to the owner of the ship (*i*) (**245**).

Of Equitable Mortgages and Assignments.

40. With a few exceptions all property of which a legal mortgage can be made (**323**) may also be effectually charged in equity. And an equitable mortgage of property situate in a country where such a mortgage will not bind the land (as in Scotland), may be so far made available that payment will be enforced out of the proceeds of the sale of the property coming

(*e*) Metropolitan, &c. Society *v.* Brown, 26 Beav. 454; Bates *v.* Duke of Beaufort, 8 Jur., N. S. 270.

(*f*) Hutchinson *v.* Kay, 23 Beav. 413.

(*g*) Place *v.* Fagg, 4 M. & R. 277; Mather *v.* Fraser, 2 K. & J. 536; Fisher *v.* Dixon, 12 Cl. & F. 312.

(*h*) Cort *v.* Sagar, 3 H. & N. 370.

(*i*) Langton *v.* Horton, 6 Jur. 910.

to the hands of the mortgagor and his assignees in bankruptcy when resident in England (*k*).

There are, however, some kinds of property, such as shipping and shares in railways and other public companies, which under the provisions of public or private statutes, or of the deeds of settlement under which the companies are constituted, can only be transferred in a particular manner, and by prescribed forms of assurance. Under the Merchant Shipping Acts (87) no equitable interest can be created except by an instrument complete according to the statutes; and the exemption (*l*) by statute of public companies from the liability to see to the execution or to take notice of trusts, and the prohibition against the entry on the register or receipt of such notices, has led to some doubt whether shares in such companies can be mortgaged in equity only (*m*). But it has been held (*n*) that the object of the prohibition in the Joint Stock Companies Act, 1856, (which is followed by the Act of 1862,) was only to preserve the titles to the shares unincumbered on the books for the convenience of the company, and that the right to make an equitable mortgage of shares, which should be valid against the assignees in bankruptcy of the mortgagor after notice to the company, was not affected. Where the statute or other restraining instrument merely points out the manner in which only a complete legal transfer can be made, an equitable interest may also be created (*o*) by a charge upon or imperfect transfer of the shares or other property, by virtue of which the mortgagor may be compelled to perfect the legal title, the equitable mortgagee being however bound, as in other cases of assignments of choses in action, to give the proper notices and to do whatever else is required to take the property out of the order and disposition of the mortgagor, in default of which the subject of the security will pass (*p*) to

(*k*) Ex parte Pollard, in re Courtney, Mont. & C. 239.

(*l*) See the Companies Clauses Act, 1845, s. 20; The Joint Stock Companies Act, 1862, s. 30, following the Act of 1856, s. 19.

(*m*) See Ex parte Boulton, in re Sketchley, 1 De G. & J. 163.

(*n*) Ex parte Stewart, re Shelley, 11 Jur. N. S. 25; 34 L. J., Bkcy. 6.

(*o*) Ex parte Pooley, 2 M., D. & De G. 505; Ex parte Dobson, id. 685; Ex parte Littledale, In re Pearse, 6 De G., M. & G. 714; Ex parte Masterman, 2 Mont. & A. 209; 4 D. & C. 751.

(*p*) Ex parte Lancaster Can. Nav.

his assignees in bankruptcy, notwithstanding the charge, on their showing (*q*) that the bankrupt was the reputed owner (**91, 346, 1086**).

41. The creation of an equitable mortgage by a formal mortgage of the equity of redemption of property, the legal interest in which has already been mortgaged, may be effected in the case of freeholds, leaseholds and personal chattels (**78**), by a mortgage in the form of an ordinary legal mortgage, and copyholds already mortgaged (**24**) may be mortgaged again by conditional surrender as long as any earlier conditional surrenderee remains unadmitted, though, as no legal interest has passed, all the securities in this case are of an equitable character. But where a prior mortgagee has been admitted, a subsequent mortgage can properly be made only by way of release of the equity of redemption, because a surrender after the admittance of a prior mortgagee would be of no avail except as evidence of a contract (*r*).

42. But a larger class of equitable mortgages consists of securities created without either deed or contract in writing; for it has long been established by Courts of Equity, notwithstanding the provision of the Statute of Frauds (*s*), which forbids an action to be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized, that an equitable mortgage may be created by a mere deposit, with intent to create a security (*t*), of deeds, court rolls or other documents of title (*u*) relating to the property proposed to be affected (*x*), though it is not necessary that they

Co., 1 D. & C. 411; Ex parte Boulton, in re Sketchley, 1 De G. & J. 163; 3 Jur., N. S. 425.

(*q*) Ex parte Stevens, 4 D. & C. 117; Ex party Pooley, supra.

(*r*) Watk. Cop. 1, 148, n.

(*s*) 29 Car. 2, c. 3.

(*t*) Ex parte Kensington, 2 Ves. & B. 83; Hankey *v.* Vernon, 2 Cox, 12.

(*u*) Ex parte Warner, 19 Ves. 202; Whitbread *v.* Jordan, 1 Y. & C. 303.

(*x*) Where the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title deeds. (Varden Seth Sam *v.* Luckpathy Royjee Lallah, 9 Moo. Ind. App. 303.)

should show a good title in the depositor (*y*),—against whom, if he deposit some of the deeds with one person and some with another, each security will be good. The intent to create the security may be established by written documents, alone or coupled with parol evidence; by parol evidence only, that the deposit was made by way of security; or by the mere inference of an agreement drawn from the very fact of the deposit (*z*). But in the last case there must be no circumstances to rebut the inference (*a*), and the security will only be established where the possession of the deeds cannot be accounted for by any other right in the holder of them. Therefore it has been held that the possession by a solicitor of his client's deeds raises no inference that they are held in pledge for a debt, as against a purchaser who neglects to inquire into the nature of the possession (*b*). The inference that the deposit was intended as a security, also appears to be less strong in the case of a debt already due than of a present advance, especially if the debt be of long standing, for a creditor coming many years after the date of the loan has been denied (*c*) the rights of an equitable mortgagee upon the strength of an unexplained possession of the deeds. To connect a debt of long standing with the possession of the debtor's deeds, the creditor must proceed upon a distinct allegation, supported by proper evidence, that they

(*y*) Roberts *v.* Croft, 24 Beav. 223; 3 Jur., N. S. 1069; 2 De G. & J. 1.

(*z*) Featherstone *v.* Fenwick, 1 Bro. C. C. 270, n.; Harford *v.* Carpenter, id.; Richards *v.* Bonett, 3 Esp. 102; Ex parte Mountford, 14 Ves. 606; Ex parte Wright, 19 Ves. 258.

(*a*) Ex parte Langston, 17 Ves. 227; Edge *v.* Worthington, 1 Cox, 211; Ede *v.* Knowles, 2 Y. & C. C. C. 172.

(*b*) Bozon *v.* Williams, 2 Y. & J. 150. The solicitor may, nevertheless, hold the deeds by his client's appointment as trustee for another person, between whom and a subsequent purchaser to whom they are fraudulently delivered serious questions of priority may arise. See Lloyd *v.* Attwood, 3 De G. & J. 651; 5 Jur., N. S. 1322.

(*c*) Chapman *v.* Chapman, 13 Beav. 308, 15 Jur. 265. Doubted by Stuart, V.-C., in a case in which a memorandum was produced, containing a proposal by the debtor that the deeds should be held as security; and held that the burthen was on the debtor to show that the creditor was only a bailee. (Burgess *v.* Moxon, 2 Jur., N. S. 1059.) But note that in Chapman *v.* Chapman, there was no evidence as to the nature of the creditor's possession, and nearly twenty years had elapsed since the date of the bond. And it has been observed by Wood, V.-C., that at the date of this decision, the evidence of the plaintiff to explain the possession was not receivable. See Mangham *v.* Ridley, 8 L. J., N. S. 309.

were delivered to him by way of security. Nor, if the plaintiff's evidence of the deposit be defective at the hearing, will he be entitled to an inquiry to enable him to establish his security; because a reference will not then be directed upon a matter which involves the very root of the plaintiff's title (*d*). Still less will the inference arising from a deposit be allowed to prevail, if its effect would be to contradict the terms of a written instrument (*e*). The rule in bankruptcy also requires that evidence be given of the intention to effect a security by the deposit. The usual order for sale in cases of equitable mortgage (**978**) has been refused (*f*) after the lapse of twelve years from the date of the deposit, there being no memorandum, and the bankrupt being dead. But an inquiry will sometimes be directed in bankruptcy as to the circumstances attending a deposit of doubtful effect (*g*).

43. A good equitable mortgage may be created, though the deposit upon which it is founded be imperfect, and even where the documents, though in the legal custody of the creditor, remain in the actual keeping of the debtor; as where a bundle of deeds marked "cash credit security, E. M. to the Royal British Bank," was found in a drawer of the bank used for his private business by E. M., who was the secretary of, and indebted to, the bank (*h*).

By the help of parol evidence this was held to be an equitable security for further advances, in addition to other securities mentioned in a memorandum previously given. But in the absence of evidence, and where the security remains in the possession of the debtor, no charge arises by reason of a memorandum annexed to it, purporting to appropriate the proceeds to satisfy a particular debt; such a memorandum not amounting to an assignment (*i*) (**63**).

44. The security may also be established against property, the title deeds of which have not actually been deposited, where a written undertaking or expression of undertaking to deposit

(*d*) Holden *v.* Hearn, 1 Beav. 456.
(*e*) Ex parte Coombe, 17 Ves. 369; Ex parte Borrodaile, 2 M. & A. 358.
(*f*) Ex parte Jones, 3 M. & A. 152, 327.
(*g*) Ex parte Clouten, 7 Jur. 135.
(*h*) Ferris *v.* Mullins, 18 Jur. 718; 2 Sm. & Gif. 378.
(*i*) Adams *v.* Claxton, 6 Ves. 226.

them or to create a security can be shown. Thus an agreement to deposit a lease when granted will create a good equitable mortgage if there be no question of the bona fides of the agreement (*h*). And where deeds relating to freehold and leasehold lands were specified in a memorandum, the security was held to cover the freehold property, although the deeds relating to it were not delivered (*l*). But the intention must be clearly shown. The depositee will not have a security over property not included in the deposited deeds, merely because he believed that it was so included, although the belief was founded upon the conduct of the debtor (*m*). The deposit of a different set of deeds from those mentioned in the memorandum has been supported, it not being shown that the latter were ever deposited (*n*).

45. The deposit of one or more deeds, which are material evidences of the title to the estate (even though they do not show a title in the depositor), will be sufficient to create an equitable mortgage where such is the intention, and where there is no fraud (*o*) A security has been held to be so created, where a letter was sent referring to inclosed particulars of title deeds, alleged to be deposited to secure a debt, though it was afterwards discovered that a paid off mortgage was the only document sent.

But where (*p*) a debtor gave all the deeds except his own conveyance to one creditor to enable him to prepare a mort-

(*h*) Ex parte Orrett, 3 M. & A. 153; and see Ex parte Smith, re Hildyard, 2 M., D. & De G. 587; Ex parte Sheffield Union Banking Company, 13 L. T., N. S. 477.

(*l*) Ex parte Leathes, 3 D. & C. 112; Ex parte Edwards, 1 Dea. 611; Ex parte Heathcoate, 2 M., D. & De G. 711; Daw *v.* Terrell, 33 Beav. 218; see Eyre *v.* M'Dowell, 9 H. L. C. 619. At law, the intention will not avail in favour of the creditor as against the assignees of the bankrupt debtor, where it is not acted upon in due time before the bankruptcy. (Wilson *v.* Balfour, 2 Camp. 579.) In Ex parte Glyn (6 Jur. 839), it was held in bankruptcy, that equitable mortgagees were not entitled to a policy agreed to be, but which was not delivered before the bankruptcy; but it seems that this cannot be supported; for the advance was made on the faith that the policy should be delivered, and the assignees could be in no better position than the bankrupt.

(*m*) Jones *v.* Williams, 24 Beav. 47; 5 Jur., N. S. 1066.

(*n*) Ex parte Powell, 6 Jur. 490.

(*o*) Ex parte Arkwright, 3 M., D. & De G. 129; S. C., Ex parte Pott, 7 Jur. 159; Lacon *v.* Allen, 3 Dr. 579; Ex parte Chippendale, 2 M. & A. 299; Ex parte Wethercll, 11 Jur. 398.

(*p*) Ex parte Pearse, Buck. 525.

gage (54), and deposited the conveyance with another creditor, promising to send him the other deeds, it was considered that the one was to have no security till he had all the deeds, nor the other till a mortgage was executed, and that neither together nor separately could they establish a security. It has been doubted whether the deposit of an attested copy of a deed would create a good equitable mortgage, though as the property belonged to partners the debtor could not deposit the original (*q*).

46. It is not necessary (*r*) for the validity of a sub-mortgage by deposit, that the written memorandum given on the original security should be deposited.

47. A mere parol agreement to deposit a deed will not be sufficient to create a security (*s*), even where notice has been given to the intended grantor to place it in the hands of the creditor (*t*).

48. An equitable mortgage by deposit affects primâ facie all the property comprised in the deposited documents, and all interests which accrue, after the date of the deposit, to the mortgagor; as, for instance, by the discharge of a prior incumbrance: and also the several interest acquired by the mortgagor, on the partition of an estate held in undivided shares at the date of the deposit (*u*). And the depositee of deeds relating to a house will be entitled to the benefit which arises by the sale of the goodwill with the house (*v*). But the depositee takes only the actual interest of the depositor in the subject of the security (*x*).

49. The extent to which the mortgagor is intended to be bound will be measured by the written agreement (where any such exists), which may be explained (*y*) by other written

(*q*) Per Sir G. Rose, Ex parte Broadbent, 1 M. & A. 635; 4 D. & C. 3.

(*r*) Ex parte Smith, re Hildyard, 2 M., D. & De G. 587.

(*s*) Ex parte Coombe, 4 Mad. 249; Ex parte Hallifax, 2 M., D. & De G. 544.

(*t*) Ex parte Perry, 3 M., D. & De G. 252.

(*u*) Ashton *v.* Dalton, 2 Col. 565; Ex parte Bisdee, 1 M., D. & De G. 333; Ex parte Farley, id. 683.

(*v*) Chissum *v.* Dewes, 5 Russ. 29.

(*x*) Ex parte Wright, 3 M. & A. 49; Ex parte Smith, re Hildyard, 2 M., D. & De G. 587.

(*y*) Ex parte Glyn, re Medley, 1 M., D. & De G. 29. See Ex parte Loyd, 3 D. & C. 765; 1 M. & A. 494.

memoranda. Therefore, if a deed relating to two estates be deposited with a memorandum referring only to one of them, that one only will be charged (*z*). And a deposit of deeds with a firm, accompanied by a writing addressed to the partners by name, and expressing the security to be for monies advanced by their house, will not alone secure advances by the firm after a change in its members; though (if the original security were not by deed), it may be made to cover both the original and the new advances in favour of the new firm, by a subsequent express or constructive, verbal or written agreement (*a*). And the leaving the deeds in the custody of each successive firm is equivalent to a re-deposit.

50. The deposit will not cover more than the sum which it was the principal object of the agreement to secure, though the agreement relate to other debts which may become due from the debtor to the creditor.

A security by deposit for separate advances of limited amount will therefore not be extended to interest and costs incurred in respect of one of them, beyond the limit fixed for that advance, though the full amount had not been paid on the other (*b*). And at law the pledge of a lease to secure the amount of a note was held not to cover a debt to the depositee for goods, although it was a condition that payment of the note should not be enforced within a certain time if the interest, and rent as well as the price of the goods to be purchased, should be regularly paid (*c*); the condition relating only to the enforcing of the note, and being ancillary to the principal object of securing the amount due thereon. In cases of doubt whether the deposit was intended to secure a prior debt, the inclination of the Court of Bankruptcy is against that construction, which is not admitted without (*d*) examination of the parties against the affidavit of the bankrupt that the intention was otherwise. A deposit made for the sole purpose of ob-

(*z*) Wylde *v.* Radford, 9 Jur., N. S., 1169.

(*a*) Ex parte Kensington, 2 Ves. & B. 79; Ex parte Lloyd, 1 Gl. & J. 389; Ex parte Alexander, id. 409; Ex parte Oakes, 2 M., D. & De G. 234; Ex parte Smith, re Gye, id. 314.

(*b*) Ex parte Hannen, 1 Dea. & Ch. 407.

(*c*) Chilton *v.* Carrington, 15 C. B. 95; 1 Jur., N. S. 89.

(*d*) Ex parte Martin, 2 M. & A. 243; 4 D. & C. 457.

taining credit will give the depositee no security for monies before advanced (*e*). A security for sums which the mortgagee *may* advance, will however be applied to past as well as future advances, if such an intention can reasonably be gathered from the circumstances (*f*).

51. As to future advances, an equitable mortgage may by parol evidence (*g*), and also (as it seems to have been intimated (*h*)) by inference alone, arising from possession of the deeds, be extended to cover such advances. A security was held to be so extended where (*i*) the deeds were previously in the mortgagee's hands to secure a debt to another person under the terms of a written memorandum, although the defendant by his answer denied that the deposit was made.

Where the original deposit created no valid security, the contract being usurious, a parol agreement for a security with legal interest, and including further advances, was held on appeal (*k*) to make a good mortgage by deposit, both for the original debt and further advances, though it was considered in the court below (*l*), that the original deposit being bad the possession remained unchanged, and that a fresh deposit or a written agreement must be shown to set up the security.

Where a voluntary settlor, who had applied part of the trust monies which had come to his hands in the purchase of an estate (the remainder having been lost by failure of the securities), deposited with the trustees the title deeds of the purchased estate, the mortgage was held to extend only to the good consideration which was retained for it; viz., the sum invested in the purchase: though before the deposit the settlor had agreed (but afterwards refused) to execute a legal security for the whole trust money (*m*).

52. A legal security cannot be extended by such means to

(*e*) Mountford *v.* Scott, T. & R. 274.

(*f*) Ex parte Farley, 1 M., D. & De G. 683; 5 Jur. 512; Ex parte Smith, re Hildyard, 2 M., D. & De G. 587.

(*g*) Ex parte Langston, 17 Ves. 227; Maugham *v.* Ridley, 8 L. T., N. S. 309; Ede *v.* Knowles, 2 Y. & C. C. C. 172; Ex parte Nettleship, 2 M., D. & De G. 124; Ex parte Hearn, Buck, 165.

(*h*) See James *v.* Rice, Kay, 231; 18 Jur. 374.

(*i*) Baynard *v.* Woolley, 20 Beav. 583.

(*k*) James *v.* Rice, 18 Jur. 818; 5 De G., M. & G. 461.

(*l*) S. C. Kay, 231; 18 Jur. 373.

(*m*) James *v.* Bydder, 4 Beav. 600.

subsequent advances made on a parol agreement for a further mortgage; because, it is said, the legal mortgagee holds his mortgage as a contract for conveyance only, and not for deposit (*n*). Parol evidence also is not admissible to show that the person with whom the deeds are deposited holds them for the security of another creditor's debt as well as his own, unless both the mortgagor and the original depositee have agreed that they shall be so held (*o*); though if the depositee himself be no creditor but a trustee only, he may be shown to hold them for another's benefit (*p*). The possession of the debtor himself cannot, it seems, be set up as a possession for the creditor; nor will an alleged possession for the latter by the debtor's wife be allowed (*q*), though she swear that the deeds were left with her with that intent, and that she had ever since kept them under lock and key.

Where one of two tenants in common in tail, with cross remainders, deposited the deeds as a security for money due from him, engaging to make a formal security when required, and the other simply joined in the deposit, it was held that only the moiety of the property which belonged to the former was affected by the security, which, as to the interest of the second depositee, only affected his estate in remainder (*r*).

53. A promise to pay a debt out of the estate of a deceased person, if the personalty be exhausted, will charge the realty, for the promise applies to all the estate (*s*). And an actual, though incomplete, agreement for a mortgage, as where the debtor wrote to his creditor (*t*), agreeing to give him a mortgage of part of certain specified property, but between the

(*n*) Ex parte Hooper, 1 Mer. 7; and see Shepherd *v.* Titley, 2 Atk. 348; where, however, there was an intervening incumbrance. Thus a person who has obtained a legal mortgage may, as to future advances, be in a worse position than an equitable mortgagee. But the distinction was confessedly made to avoid an extension of the doctrine acted upon in Ex parte Langston. The result justifies the remark made in another case by Lord Eldon, that "departing from the Statute (of Frauds), we have no rule to go by."

(*o*) Ex parte Crossfield, 3 Ir. Eq. Rep. 67.

(*p*) Ex parte Whitbread, 19 Ves. 209.

(*q*) Ex parte Coming, 9 Ves. 115.

(*r*) Pryce *v.* Bury, 17 Jur. 1173; 2 Drew. 11, and 18 Jur. 967.

(*s*) Suart *v.* Toulmin, Pow. Mort. 1049, b.

(*t*) Sir Simeon Stuart's Case, cit. 3 Ves. 576, and 2 Sch. & Lef. 381.

letter and his death conveyed to trustees for the payment of his debts; or a defective security (*u*), as amounting in equity to a good agreement to charge the land, will be carried into effect by a Court of Equity, according to the manifest intent of the parties.

But an agreement for, or preliminary step in, the effecting of a security, cannot be set up as an equitable mortgage if it have been laid aside unacted upon, by the creditor. He must, if any lapse of time have taken place, be able to show that he intended to carry it out, and had taken the necessary steps to render his security effectual. Therefore a creditor to whom the debtor had given an order for the transfer of certain shares in a company, which he had not acted upon for three years, nor during that period had given notice to the company, was held (*x*) not to have any equitable lien on the shares, though it was proved that a sum of money had been advanced by the creditor upon the day on which the order was dated. Nothing had been done, which would have prevented the debtor from selling the shares to a stranger at any moment.

54. A delivery of deeds, to be held until the execution of a mortgage, amounts to an equitable charge (*y*). But the question whether a delivery of title-deeds, for the purpose of preparing a legal mortgage, will of itself operate as an equitable security, has been the subject of conflicting decisions; where there is already an existing debt, the question may perhaps be now satisfactorily answered in the affirmative. The contrary was formerly held by Lord Hardwicke (*z*) (although the case was supported by parol evidence, on the ground of the uncertainty of the agreement proved, and because it was sought to bind the heir; which there was no proof that the debtor, even assuming his intention to execute a mortgage, intended to do), by Lord Thurlow (*a*), and Sir

(*u*) Dale *v.* Smithwick, 2 Vern. 151.

(*x*) Cumming *v.* Prescott, 2 Y. & C. 488.

(*y*) Lloyd *v.* Attwood, 3 De G. & J. 614; 5 Jur., N. S. 1322; Fenwick *v.* Potts, 8 De G., M. & G. 506.

(*z*) Brizick *v.* Manners, 9 Mod. 284.

(*a*) Ex parte Bulteel, 2 Cox, 243.

William Grant(*b*); who considered that no intention being apparent, from a delivery for this purpose, of an intention to create a pledge, such an intention should not be raised by inference. Sir William Grant, however, appears to have assumed too strongly the want of intention to pledge, alleging that it was a thing which none of the parties had in contemplation. The fact was, that the evidence upon the point was conflicting, it being sworn by the solicitor who was to have prepared the mortgage, that he understood that the deeds were left with him, not only for that purpose, but also that he might keep them, together with the intended mortgage. And it seems(*c*) to have been well established by later decisions that an equitable security does arise by a delivery for the purpose of preparing an actual mortgage. It was remarked by Lord Eldon, that a deposit made with that object, is of greater force than an implied intention to mortgage arising from a mere deposit (**42**), and consequently also amounts to a security.

It was observed (*d*) by Mr. Coventry, writing before the decision of *Keys* v. *Williams*, that the judgments of Lord Eldon and Sir William Grant disclosed a want of attention to the distinction between a deposit as a pledge, and a delivery of deeds for the purpose of preparing a mortgage; and he remarked, that, in the latter case, the previous agreement explains the purpose for which the deeds were delivered, and rebuts the presumed contract which would otherwise arise, that the deeds were handed over with a view to a present security. The distinction is plain enough, but not necessarily applicable. The possession of the deeds is an incident of the legal mortgage. Now the principle set up in the old cases, and defended by Mr. Coventry, amounts to this,—that although a simple deposit of deeds may by inference alone amount to a security, yet a delivery for the purpose of making a better,

(*b*) Norris *v.* Wilkinson, 12 Ves. 192; and see Brandon *v.* Bowles, Pre. Ch. 375.

(*c*) See Ex parte Bruce, 1 Rose, 374; Edge *v.* Worthington, 1 Cox, 211; Keys *v.* Williams, 3 Y. & C. 55.

(*d*) Powell, Mort. 1056, ed. 6.

i. e. a legal, security, to the very person by whom under that security the possession is to be retained, is of less force. It would be strange if a creditor who has exerted himself to obtain a contract for a legal mortgage to secure his debt, and in consequence of that contract has obtained possession of the deeds, should be in a worse position than if he had obtained a lien on the deeds by mere inference, founded on possession; and unreasonable that the inference of a security, which the law would annex to his possession of the deeds, where he had made no actual bargain, should be taken away because he had stipulated for something which would carry with it a right to that possession. The question is entirely one of inference. Where a present loan is in course of negotiation, the delivery of the deeds for the purpose of preparing the mortgage would effect no security, because no debt would be in existence. But where a debt exists already, is it not at the least as reasonable to infer that a delivery for that purpose is as if the debtor had said,—"You are to have a mortgage which will carry with it a right to the custody of the deeds; therefore take them at once, and prepare the mortgage at your leisure," as to infer in the first instance that a deposit without any bargain at all should amount to a security? The doctrine of equitable mortgages being once established, the application of it to the cases under consideration seems, if it be an extension, to be one founded in reason and justice.

And the doctrine has been applied against executors (*e*) in favour of a residuary legatee, whose share they had agreed to secure by a legal mortgage of part of the assets, although the mortgage did not bind the interests of the other legatees.

55. A person who has bonâ fide advanced money on the security of a deposited instrument to a person who has a good apparent title, and without notice that the property to which it relates is trust estate, has a good charge thereon, and the means of redeeming him will be obtained, in the absence of any other fund, from the residue of the trust estate (*f*).

56. The act to facilitate the proof of title to and the con-

(*e*) Hockley *v.* Bantock, 1 Russ. 144. (*f*) Sharshaw *v.* Gibbs, Kay, 333.

veyance of real estates, declares that no equitable mortgage or lien on registered land shall be created by a deposit of title deeds (*g*); but the deposit of the land certificate shall, for the purpose of creating a lien on the estate and interest of the depositor, have the same effect as a deposit of the title deeds of the estate would have had before the passing of the act (*h*).

57. A power of attorney by the debtor to the creditor to receive the rents of an estate, and to apply them in payment of the interest of the debt and of the premiums on a policy, or to repay himself out of the surplus proceeds of the sale of an estate mortgaged to the debtor, or to mortgage the debtor's land for payment of the debt (*i*), will also create an equitable charge; such a power being irrevocable until payment of the debt (*k*), and giving a right to a decree for an account, and to the ultimate remedies of equitable mortgagees.

58. A simple covenant or agreement to charge land will not create a charge upon the debtor's real estate where no particular land is mentioned, or the agreement is only for a personal with power to call for a real security, or where it otherwise appears to be intended to rely only upon the covenant (*l*). Therefore a covenant or written promise to give a security by mortgage, or to sell lands when required (*m*), or a mere covenant to settle lands of a certain value (*n*), or at or within a certain time, will not amount to an equitable charge. It is otherwise if the covenantor agree to charge property or the income of property already in his possession (*o*), or such as he may hereafter acquire of a specified kind or to be derived from a specified source (*p*): or if he point out by a subsequent instrument particular lands as those which were

(*g*) 25 & 26 Vict. c. 53, s. 63.

(*h*) S. 73.

(*i*) Abbott *v.* Stratten, 3 J. & L. 603; Spooner *v.* Sandilands, 1 Y. & C. C. C. 390; Hodgson's case, 1 Gl. & J. 13; In re Parkinson, 13 L. T., N. S. 26, Ir.

(*k*) Ibid.; Gaussen *v.* Morton, 10 B. & C. 731.

(*l*) Collins *v.* Plummer, 1 P. W. 104.

(*m*) Williams *v.* Lucas, 2 Cox, 160; Berrington *v.* Evans, 3 Y. & C. 384.

(*n*) Freemoult *v.* Dedire, 1 P. W. 429; Mornington *v.* Keene, 2 De G. & J. 292, 4 Jur., N. S. 981; notwithstanding Roundell *v.* Breary, 2 Vern. 481, misreported; see 2 De G. & J. 319, note.

(*o*) Legard *v.* Hodges, 1 Ves. J. 477; Ravenshaw *v.* Hollier, 7 Sim. 3.

(*p*) Metcalfe *v.* Archbishop of York, 1 M. & C. 547; 6 Sim. 224; Lyde *v.* Minn, 1 M. & K. 683; 4 Sim. 505; Buller *v.* Plunkett, 7 Jur., N. S. 873.

intended to be charged (*q*). And where an intended husband gave a bond to convey sufficient real estate to secure his wife a certain annuity in bar of dower, which she accepted, the obligation was held (*r*) to be a charge upon the real estates of which the husband died seised in fee, but only to an amount not exceeding the dower which but for the annuity she might have claimed. And a bond conditioned to be void if the intended husband should become seised of any real estate in possession, and should settle it on the intended wife and the issue, was held (*s*) to bind all the real estate of which he became seised during his life, though he survived his wife and married again, and the obligation was recited to be for making better provision for the wife if she should survive him. But an obligation merely limited to the real and personal estate of the covenantor, will affect only that of which he dies possessed, and not such as did not belong to him at his death, whether he had it at the date of the obligation or acquired it afterwards (*t*).

59. Where the covenant is to make a charge at a future period, on the arrival of which the covenantor is in possession of lands which he has acquired for the very purpose of the charge, there will also be a charge upon those lands (*u*). And it will even be assumed, where a man has bound himself to do a certain act and does something which may enable him to fulfil his obligation, that he acted with the view of fulfilling it. So that where there is a covenant to pay money to trustees to be laid out in the purchase of lands, or to purchase and settle lands, and the covenantor purchases lands but does not settle them or pay the money, the lands will be taken to have been purchased in performance of and will be subject to the covenant (*x*). The lands must be acquired subsequently to the covenant, and by purchase, or in a manner consistent with the presumption that the object was to fulfil the covenant.

(*q*) Watson *v.* Sadleir, 1 Mol. 585.

(*r*) Tew *v.* Earl of Winterton, 3 Bro. C. C. 493.

(*s*) Prebble *v.* Boghurst, 1 Sw. 321.

(*t*) Needham *v.* Smith, 4 Russ. 318.

(*u*) Wellesley *v.* Wellesley, 4 M. & C. 561.

(*x*) Sowden *v.* Sowden, 1 Bro. C. C. 582; Lechmere *v.* Lechmere, Ca. temp. Talbot, 80; 3 P. Wms. 211; Wilcox *v.* Wilcox, 2 Vern. 558; and see Tooke *v.* Hastings, id. 97.

Therefore there was no charge upon lands to which the covenantor was entitled at the date of the covenant, and for the conveyance of which he afterwards obtained a decree (*y*). The presumption also will not arise where the settlement contains only a power and not an express trust to purchase lands; nor any covenant by the husband to purchase and settle (*z*). And the expenditure of money by the covenantor in building upon the land of the covenantee will not be admitted as a satisfaction of the covenant to pay the money to him where it does not appear that the outlay was so intended (*a*).

60. A covenant that land settled for jointure is of a certain yearly value will create a charge for that amount on the estate of the covenantor (*b*). And an agreement to charge land, which at the date of the agreement had been sold, will bind the purchase money (*c*).

61. No charge will generally be created by a covenant in a lease to keep chattels of a certain value on the premises as security for the rent, as against the assignees in bankruptcy of the covenantor claiming by virtue of his reputed ownership (*d*); though it seems that such a charge may arise where, by reason of the custom of the neighbourhood to insert such covenants in leases, possession of the chattels by the tenant may not be primâ facie evidence of unincumbered ownership.

62. An equitable security may also be established by parol or other evidence of arrangements which are the subject of a separate agreement, or are referred to in a deed relating to the transaction out of which the security is held to arise; as where (*e*) incumbrancers had joined in assigning their security, upon the terms that they should be secured by subsequent mortgages, which were never executed, and were held entitled to an equitable charge as second incumbrancers. So upon real estate, in favour of the obligee of a bond, by a recital therein, that the obligor had become possessed of the

(*y*) Gardner *v.* Marquis Townshend, G. Coop. 301.

(*z*) Lench *v.* Lench, 10 Ves. 511.

(*a*) Wiles *v.* Gresham, 2 Dr. 258.

(*b*) Probert *v.* Morgan, 1 Atk. 440.

(*c*) Ex parte Rogers, 2 Jur., N. S. 480.

(*d*) Shuttleworth *v.* Hernaman, 1 De G. & J. 322.

(*e*) Banks *v.* Whittall, 1 De G. & S. 536; Beckett *v.* Cordley, 1 Bro. C. C. 353.

estate under a certain will, upon the execution whereof he had promised the testator to provide for the obligee (*f*). So where the rent arising under a lease was assigned to the creditor (*g*), there being in the assignment a recital that a security was intended, and a covenant for further assurance of the rent, the covenant was held to be in equity a covenant to make a mortgage, and the case to be within the rules of equitable mortgages.

Of Equitable Assignments.

63. It will be convenient to notice here a kind of security commonly known as an equitable assignment, but which is recognized at law as well as in equity, and is an appropriation of certain property to the payment of a debt. A person entitled to a debt, or chose in action, or equitably entitled to a fund, may create a security thereon not countermandable in favour of a third person, either by agreement with him, or by an order upon the debtor or holder of the fund to pay it to the assignee, by which agreement or order, after notice thereof, the debtor or holder of the fund will be bound (*h*). Such an agreement, if it be clearly proved, may be verbal as well as in writing; and has therefore been supported (*i*) upon the uncontradicted evidence of the creditor, after the debtor's death, that the latter desired him to take and sell certain goods and retain his debt out of the proceeds: which direction he had followed.

And provided the intention be clear, no particular form of assignment is necessary (*k*); a power of attorney (*l*), or words which only import an authority or a wish, being sufficient (*m*). But it must appear that the fund is to be paid to the person

(*f*) Ex parte Atkins, 2 Y. & C. 536.

(*g*) Ex parte Wills, 2 Cox, 233.

(*h*) Smith *v.* Everett, 4 Bro. C. C. 63; Row *v.* Dawson, 1 Ves. 331, explained 1 De G., M. & G. 774; Burn *v.* Carvalho, 4 M. & C. 690; Ex parte Steward, 3 M., D. & De G. 265. An order by one of a firm to his partner at a distance, who would have the sole possession of the property, has been held sufficient. (Rayner *v.* Harford, 6 W. R. 743.)

(*i*) Gurnell *v.* Gardner, 9 Jur., N. S. 1220; and see Riccard *v.* Prichard, 1 K. & J. 277.

(*k*) Per M. R., Bell *v.* L. & N. W. Rail. Co., 15 Beav. 548.

(*l*) Bennett *v.* Cooper, 9 Beav. 252.

(*m*) Lett *v.* Morris, 4 Sim. 607; Diplock *v.* Hammond, 2 Sm. & G. 141; Chowne *v.* Baylis, 31 Beav. 351; 8 Jur., N. S. 1028.

who claims the benefit of the assignment. A direction to debtors to pass cheques for sums due to the creditor, to the account of the latter with a certain bank, was held not to give the bank an interest in the cheques; though a direction to pass the cheques to the bank would have done so (*n*). The fund itself need not be of certain amount, if it be sufficiently indicated (*o*); nor the debt to be paid if a limit be fixed to the sum appropriated (*p*).

64. Besides these things, there must be a distinct unequivocal engagement that the particular fund shall be made liable to the debt. A letter to the holder of the fund, stating that a particular person is a claimant upon it, is not an assignment (*q*); nor is an intimation to the creditor by his debtor that he has made arrangements for payment of the debt out of a fund over which he still retains the control, or a promise to pay it out of a particular debt or fund,—such an arrangement being countermandable (*r*); and the debtor's statement to the creditor that the arrival of a certain expected ship will put him in funds to adjust his account, or a direction in a bill of exchange to place it against a particular account, will be equally inoperative (*s*). Nor is an assignment created by giving an authority to a person without interest in the debt to receive it, though he promise to pay it to the creditor of the person who gives the authority; because such a transaction embraces neither a direction to the person who owes the money, nor a direct agreement between the debtor and the creditor (*t*).

65. As between the assignor and assignee, it is not necessary for the validity of an equitable assignment, that any notice should be given to the person from whom the debt is due (*u*); though to prevent the debtor from afterwards paying

(*n*) Bell *v.* L. & N. W. Rail. Co., 15 Beav. 548.

(*o*) Riccard *v.* Prichard, 1 K. & J. 277.

(*p*) Hutchinson *v.* Heyworth, 9 A. & E. 375.

(*q*) Watson *v.* Duke of Wellington, 1 R. & M. 602.

(*r*) Malcolm *v.* Scott, 3 Hare, 39; Bradley *v.* ——, Ridg. Ch. 194.

(*s*) Jones *v.* Starkey, 16 Jur. 510; Ex parte Carruthers, 3 De G. & S. 570.

(*t*) Rodick *v.* Gandell, 12 Beav. 325; 1 De G., M. & G. 763.

(*u*) Per Lord Truro, 1 De G., M. & G. 780; see Rayner *v.* Harford, 6 W. R. 743.

the fund to the assignor, it is of course proper that such notice should be given. Still less is it necessary that the person who receives the order should enter into any contract for the application of the fund in the manner directed. And the order will stand though the person who gives it become bankrupt, or die before it reaches the holder of the goods, or can otherwise be acted on (*x*); or though, after it be given, the giver be arrested for the debt by the person in whose favour the order was made (*y*).

66. The rules of law, however, upon this subject require that the holder of the fund shall give his express or implied consent to hold it for the benefit of the person to whom it is directed to be paid; and who, until this consent be given, has no claim against the holder by reason of the direction for payment; the fund in the meantime being held for the use of the remitter, or for such purposes as he may direct (*z*). The like rule applies even in equity, in the case of a mere mandate from a principal to an agent, which is capable of being revoked, and gives no right or interest to the subject of it. If, therefore, consignors of goods direct the consignee to pay part of the proceeds to creditors of the consignors, the direction creates no lien, either at law or in equity (*a*). The result was the same where the creditors, who had heard of the direction after its revocation, obtained possession of the goods and sold them under an attachment (*b*). But where consignments have been received and applied under an arrangement in keeping down an annuity, the application amounts to an undertaking by the consignee to continue the payments, so far as the consignments shall be sufficient (*c*).

67. When a debtor has received notice of an equitable assignment of the debt he is bound to pay it to the assignee, although the latter refuse to give him an indemnity; and it is

(*x*) Ex parte South, 3 Sw. 392; Burn *v.* Carvalho, 4 M. & C. 690; Gurnell *v.* Gardner, 9 Jur., N. S. 1220.

(*y*) Ex parte Alderson, 1 Mad. 53.

(*z*) Williams *v.* Everett, 14 East, 582; Baron *v.* Husband, 4 B. & Ad. 611; see Ex parte Heywood, 2 Rose, 355.

(*a*) Ex parte Heywood, 2 Rose, 355.

(*b*) Scott *v.* Porcher, 2 Mer. 652.

(*c*) Fitzgerald *v.* Stewart, 2 R. & M. 457; S. C., 2 Sim. 333; Kirwan *v.* Daniel, 5 Hare, 493.

no excuse for refusal and payment to the assignor that he has brought an action to recover it, to which the debtor has no defence at law; for a Court of Equity will indemnify him by making the wrongful claimant pay the costs. And the fact that, after the assignment, the assignor has become bankrupt, or has made a composition with his creditors, makes no difference (*d*). But the holder of the property, even though he have accepted notice of the assignment, is not bound to deliver it to the assignee, unless the assignee's title be complete according to the law of the country where the property is situate. Therefore where the assignment related to real estate, and was ineffectual by the law of the country where the land was situate, the holder was justified in delivering it to the assignor under threat of an action by which he would have been compelled to do so (*e*).

Of the Registration of Mortgage Securities.

68. By the Registry Acts for Middlesex, the three Ridings of York, Kingston-upon-Hull, and Ireland (*f*), a memorial of all deeds and conveyances, and of all wills and devises in writing, concerning and whereby any hereditaments may be any way affected in law or equity, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration (*g*), unless such memorial thereof be registered as by the act is directed; in the case of a deed or conveyance, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim, and in the case of a will, at the time and in the manner by the acts directed (**172**).

69. The acts provide for the registration of the memorials, and (except in the case of the North Riding act) for the filing of every memorial in order of time as the same shall be brought

(*d*) Hutchinson *v.* Heyworth, 9 A. & E. 375; Jones *v.* Farrell, 1 De G. & J. 208.

(*e*) Sichell *v.* Raphael, 11 Jur., N. S. 1165.

(*f*) Middlesex, 7 Anne, c. 20; West Riding, 2 & 3 Anne, c. 4, 5 Anne, c. 18; East Riding and Kingston-upon-Hull, 6 Anne, c. 35; North Riding, 8 Geo. 2, c. 6; Ireland, 6 Anne, c. 2; further regulated by 2 & 3 W. 4, c. 87, and 27 & 28 Vict. c. 76.

(*g*) And also against creditors by judgment, recognizance or statute. (Irish act, s. 4.)

to the office, and for the entry or registration of the memorials in the order in which they come to the hands of the registrar. The Irish act contains (*h*) the further important provision, that every deed or conveyance, a memorial whereof shall be duly registered, shall be good and effectual, both at law and in equity, according to the priority of time of registering the memorial and according to the right and interest of the persons conveying.

Memorials of wills, that shall be registered within six months after the death of a devisor or testatrix dying within Great Britain, or within three years after the death of a devisor or testatrix dying upon, or in any parts beyond, the seas, shall be as effectual against subsequent purchasers as if the same had been registered immediately after the death of the devisor or testatrix; and this provision, though it be affirmatively expressed, also imports (*i*) that wills shall not be valid unless registered in the manner mentioned in the act.

70. If the devisee or person interested in the hereditaments devised, by reason of the concealment (*k*), suppression (*k*), or contesting of the will or other inevitable difficulty, without his, her or their wilful neglect and default, shall be disabled to exhibit a memorial for the registry thereof within the times limited, and a memorial shall be entered (*l*) of such contest or other impediment within two years (*m*) after the death of a devisor or testatrix who shall die within Great Britain, or within four (*n*) years after the decease of such person upon or beyond the seas, the registry of the memorial of the will within six months after his, her or their attainment of such will or a probate thereof, or the removal of the impediment to the exhibiting of the memorial, shall be a sufficient registry within the act.

The words "inevitable difficulty" used in this provision do

(*h*) Sect. 4.

(*i*) Chadwick *v.* Turner, L. R., 1 Ch. App. 310.

(*k*) These words are only in the Middlesex act.

(*l*) The provision as to the entry of the memorial of the impediment is not in the West Riding act or the Irish act.

(*m*) Six months in the acts for the North and East Ridings. In the Irish act six months after the attainment of the will or probate, or the removal of the impediment.

(*n*) Three years in the same acts.

not refer (*o*) to such inevitable difficulty as would admit of the entry of a memorial of it on the register, such as a case where the will is not forthcoming. But as it would be repugnant to the provisions of the act to hold that it extends to cases in which the devisees know the contents of a will which is not forthcoming, and the act does not distinguish between those who do and those who do not know the contents of such a will, no protection is given to devisees under a will which has not been discovered by them till the expiration of six months after the death of the testator, and where, in consequence, no memorial of the will, or of an impediment preventing its registration, has been registered within the time prescribed by the act.

71. It is also provided (*p*), that in case of any concealment or suppression of any will or devise, purchasers shall not be defeated or disturbed unless the will be actually registered within five (*q*) years after the death of the devisor or testatrix.

72. In case of mortgages, whereof memorials shall be entered in the registry office, if at any time afterwards a certificate shall be produced to the registrar, signed by the mortgagee or mortgagees, his, her or their executors, administrators or assigns, and attested by two witnesses, whereby it shall appear that all monies due have been paid or satisfied, and which witnesses shall prove upon oath the payment or satisfaction and signing of the certificate, an entry shall be made in the margin of the registry book against the registry of the memorial of the mortgage, that the mortgage was satisfied and discharged according to the certificate to which the same entry shall refer, and the certificate shall be filed to remain upon record in the registry office.

73. The acts do not extend (*r*) to any copyhold estates, or to any leases at rack rent, or for a term not exceeding twenty-one years, where the actual possession and occupation go with

(*o*) Chadwick *v.* Turner, L. R., 1 Ch. App. 310, on the construction of the East Riding act.

(*p*) Not in the acts for the West or East Riding.

(*q*) Three years in the North Riding act.

(*r*) The exception is not in the West Riding act. The Irish act confines it to leases for twenty-one years with actual possession. (Sect. 14.)

the lease, or to any of the chambers in Serjeants' Inn, or the Inns of Court or Chancery, in Middlesex. It is, however, considered advisable, though not clearly necessary, to register leases of copyholds where leases of freeholds would be registered, the lease being a common law interest (*s*).

Although Serjeants' Inn is within the city of London, it is considered that the exception of it from the operation of the act was an error, and does not imply that assurances of property within the city must generally be registered; and this understanding is commonly acted upon in practice (*t*).

74. It was intimated (*u*), in a case which arose under the Irish Registry Act, that the exception in favour of leases not exceeding twenty-one years, where the actual possession goes with the lease, does not apply to a mere case of legal possession by receipt of the rents, but to such a possession only as is accompanied by occupation; because the object of the act being to guard against secret conveyances, a visible occupation is not within the mischief, but is a substitute for registration; whereas legal possession only may be entirely unknown. In the English acts the expression is, "where the actual possession *and occupation* go along with the lease." And when, by means of a mortgage, the possession and occupation are divided, it is proper to register the assignment of a beneficial lease; but not where the transaction is merely an assignment for valuable consideration, for then the possession and occupation still go with the lease (*x*). With respect to a doubt which has been raised (*y*), whether a lease originally at rack rent, but which by improvements or otherwise has since become valuable, be within the exception of the act, it has been argued with force, that it ought to remain so (*z*), because it ought not to be affected by matter *ex post facto*, or to vary with the value of property.

75. The necessity for registration does not of course arise in the case of a mere equitable mortgage by deposit, without

(*s*) Sugd. V. & P. 980, ed. 11; 732, ed. 14.

(*t*) Ibid.

(*u*) Fury *v.* Smith, 1 Huds. & Bro. 735.

(*x*) Sugd. V. & P. 980, ed. 11; 732, ed. 14; and Rigge on Registry, 88, note (*o*).

(*y*) Rigge on Registry, 88, note (*n*).

(*z*) Sugd. V. & P. 980, ed. 11; 732, ed. 14.

memorandum, there being no instrument which can be registered (*a*); and it was once held, that an agreement to charge lands and to execute an assignment was not within the acts (*b*). But the word "conveyance," and other expressions in the act, are now held to refer to equitable as well as legal incumbrances, and to instruments not under seal, as well as to deeds: and a direction to prior mortgagees to hold the title deeds, subject to their own security for the benefit of subsequent mortgagees, or other form of agreement for a mortgage, is considered to require registration, as a document within the mischief of the acts (*c*). An assignment of a sum of money charged upon land has been held not to require registration (*d*); and it appears to be only by a somewhat strained construction of the acts that such an interest can be included in them. The decision, however, has been doubted, and it is said that in Ireland it is not relied upon in practice (*e*) (**1155, 1274**).

76. By the act to facilitate the proof of title to and the conveyance of real estates it is provided (*f*), that the registrar is to enter in a book to be entitled "the Register of Mortgages and Incumbrances," under the same numbers which refer to the property in the register of estates, an account of all the charges and incumbrances affecting the lands or any part thereof, or the estate or interest therein of any person named in the record of title, a copy of which is to be contained in the land certificate delivered to the owner of any estate or interest in the lands. A certificate shall be granted to any person who shall appear by the register of incumbrances to be entitled to any mortgage charge or incumbrance on registered lands, which certificate shall contain a description of the lands and the particulars of the incumbrance.

77. The enactments which required (*g*) the enrolment of grants of annuities, or rent charges for life or lives or term of years, or greater estate determinable on life or lives, having

(*a*) *Sumpter v. Cooper*, 2 B. & Ad. 223.

(*b*) Wright *v.* Stanfield, 27 Beav. 8; 5 Jur., N. S. 5.

(*c*) Moore *v.* Culverhouse, 27 Beav. 639; Neve *v.* Pennell, 2 H. & M. 170; 33 L. J., Ch. 19.

(*d*) Malcolm *v.* Charlesworth, 1 Keen, 63.

(*e*) Davids. Conv. 2; 665, ed. 2.

(*f*) 25 & 26 Vict. c. 53, ss. 14, 68.

(*g*) 53 Geo. 3, c. 141.

been repealed (*h*), it has been provided (*i*) that any annuity or rent charge granted after the passing of the act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name, place of abode, and title, trade or profession of the person whose estate is intended to be affected thereby, and the date of the instrument by which the annuity is granted, and the annual sum or sums to be paid, be left with the Senior Master of the Common Pleas at Westminster for registration according to the act. By another section (*k*), which is placed after the provisions for searching the registers, it is provided that the act shall not extend to require the registry of annuities or rent charges given by will. Looking only to the grammatical construction of the twelfth section, it is doubtful whether the exception contained in it was intended to apply to all annuities granted by marriage settlement, or only to those which might be granted by marriage settlement for lives, or for years or greater estates determinable on lives. The latter appears to be the better construction; but the preamble of the clause and the expressions of the act of George III., which the modern act was intended in some measure to replace, and in which marriage settlements and wills are excepted together, leave little doubt that the intention of the modern act was to subject to registration any annuity or rent charge granted after the passing of the act for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, except such as might be granted by any marriage settlement.

78. For the greater security of purchasers and mortgagees of chattels it has been enacted (*l*), that every bill of sale of personal chattels made after the 10th day of July, 1854, either absolutely or conditionally, or subject or not subject to

(*h*) 17 & 18 Vict. c. 90.
(*i*) 18 & 19 Vict. c. 15, s. 12, 1855.
(*k*) Sect. 14.
(*l*) 17 & 18 Vict. c. 36, s. 1, Bills of Sale Act, 1854.

any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit (*m*) of the time of [when] such bill of sale being [was] made or given, and a description of the residence and occupation of the maker or giver thereof, or, in case the same shall be made or given by any person under or in execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed (85) with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale (as a warrant of attorney in a personal action given by a trader is by law required to be filed), *otherwise* such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale, under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of Law or Equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which, at or after the time of such bankruptcy, filing the petition in insolvency, execution by the debtor of the creditor's deed, or execution of such process (as the case may

(*m*) i.e., the bill of sale and the affidavit are to be filed simultaneously. (Grindell *v.* Brendon, 5 Jur., N. S. 1420.)

be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the maker of the bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be.

79. To create a necessity for registration, there must therefore be an apparent possession by the maker of the bill of sale, and non-registration for twenty-one days after it is made. So that if, within twenty-one days after the making, the assignee takes and retains possession, he acquires a good title and no registration is necessary (*n*). And an imperfect registration does not place the assignee in a worse position than if there were none (*o*). If the registration be perfected, the act does not regard the completion of the transaction in other respects (*p*): and it is no objection that the bill of sale was registered as of the day of its execution, though the consideration was not paid, nor the deed attested, till after the day of the actual execution.

The registration of the bill of sale is necessary for its validity only as against the persons mentioned in the first section of the act; and not as against the holder of a subsequent bill of sale. But the effect of an execution against an unregistered bill of sale, displaces it entirely, and not merely as concerns the execution creditor (*q*).

80. The description of the residence and occupation required by the statute must set forth the residence and occupation at the time of the making of the bill of sale and not at the time of filing the affidavit (*r*). Both in the case of the maker of the bill and of the attesting witness the place of employment will sufficiently indicate the place of residence (*s*);

(*n*) Marples *v.* Hartley, 7 Jur., N. S. 446; Hollingsworth *v.* White, 6 L. T., N. S. 604.

(*o*) Banbury *v.* White, 9 Jur., N. S. 913; 2 H. & C. 300; but it does not appear by the report that the assignee had taken possession.

(*p*) Darvill *v.* Terry, 6 H. & N. 807.

(*q*) Richards *v.* James, L. R., 2 Q. B. 285.

(*r*) London and Western Loan Co. *v.* Chase, 9 Jur., N. S. 412; 12 C. B., N. S. 730.

(*s*) Blackwell *v.* England, 3 Jur., N. S. 1302; 27 L. J., Q. B. 124; Attenborough *v.* Thompson, 2 H. & N. 559.

and if the residence be described with convenient certainty the registration will not be vitiated by an addition which, though erroneous, is not calculated to mislead (*t*).

As to the occupation, though a person who has none may well be described as a gentleman (*u*), such a description is improper for one who has an employment, and even it seems for an attorney, though his proper legal description is that of gentleman (*x*). The occupation and residence must also be set forth in the affidavit, and will not be sufficiently described by reference to the bill of sale (*y*).

The clause which requires a statement of the residence and occupation of the attesting witness applies to every bill of sale included in the act, whether it be or be not made under or in execution of any process (*z*).

It has been held sufficient to file a copy of the schedule with the original bill of sale where the original schedule had been disannexed and lost (*a*).

The affidavit must be made by the attesting witness, but it need not state that the deponent was the witness; it being sufficient (*b*) if, on the face of the bill and affidavit, it is obvious that the deponent and the attesting witness were the same person.

81. If such bill of sale shall be made or given (*c*) subject to any defeasance or condition, or declaration of trust (*i. e.*, a declaration of trust in which the grantor is interested, a trust in favour of the grantee being of no importance to creditors (*d*)), not contained in the body thereof, such defeasance, condition

(*t*) Hewer *v.* Cox, 6 Jur., N. S. 1339.

(*u*) Morewood *v.* South Yorkshire Railway Co., 3 H. & N. 798; Gray *v.* Jones, 14 C. B., N. S. 743.

(*x*) Tuton *v.* Sanoner, 3 H. & N. 280; Allen *v.* Thompson, 1 H. & N. 15; Beales *v.* Tennant, 6 Jur., N. S. 628; Adams *v.* Graham, 10 Jur., N. S. 356.

(*y*) Pickard *v.* Bretz, 5 H. & N. 9; Walton *v.* English, 3 Jur., N. S. 294; but see Banbury *v.* White, 9 Jur., N. S. 913.

(*z*) Tuton *v.* Sanoner, 4 Jur., N. S. 365.

(*a*) Green *v.* Attenborough, 3 H. & C. 468; 11 Jur., N. S. 14.

(*b*) Routh *v.* Roublet, 28 L. J., Q. B. 240. Directors of a company who sign the bill of sale for the purpose of authenticating the seal are not considered to be attesting witnesses within the act. (Shears *v.* Jacob, L. R., 1 C. P. 513; Deffell *v.* White, 2 id. 144.)

(*c*) Sect. 2. Bills of Sale Act, 1854.

(*d*) Robinson *v.* Collingwood, 10 Jur., N. S. 1080; 34 L. J., C. P. 18.

or declaration of trust shall for the purposes of the act be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same, or a copy thereof respectively, shall be filed; *otherwise* such bill of sale shall be null and void to all intents and purposes as against the same persons, and as regards the same property and effects, as if such bill of sale, or a copy thereof, had not been filed according to the provisions of the act.

82. In the construction of this act (*e*) the term *bill of sale* includes bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt; *but not* assignments for the benefit of the creditors of the maker or giver of the bill of sale, marriage settlements, transfers or assignments of any ship or vessel, or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts, or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented.

83. Assignments for the benefit of creditors may fall within the exception, though not appearing on the face of them to be executed by all the creditors (*f*), provided they do not exclude any; a postnuptial settlement not made in pursuance of an ante-nuptial agreement, and therefore not being within the marriage consideration, must be registered (*g*). The bill of sale, whatever its form, must be an instrument by which a title to the goods is acquired; and the term therefore

(*e*) Sect. 7.

(*f*) General Furnishing Co. *v.* Venn, 9 Jur., N. S. 550; 2 H. & C. 153.

(*g*) Fowler *v.* Foster, 5 Jur., N. S. 99.

does not include such a document as a receipt for purchase-money, though it refers to an inventory of the goods (*h*).

84. The expression *personal chattels* means goods, furniture, fixtures and other articles capable of complete transfer by delivery. It is not necessary (*i*) to register a conveyance of or contract concerning land, by the mere force of which a legal or equitable interest in fixtures or other chattels, as adjuncts to the land, is passed. But fixtures which are only such for the purposes of trade, and not as permanent adjuncts to the land, being liable to be distrained, and capable of transfer by delivery, are within the act when separately assigned, and are not exempt because the land may be charged by the same instrument (*k*).

The term *personal chattels* does not include chattel interests in real estate, nor shares or interests in the stocks, funds or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale.

And personal chattels are deemed to be in the *apparent possession* of the maker or giver of the bill of sale, so long as they shall remain or be in or upon any premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession may have been taken by or given to any other person; that is to say, if nothing has been done beyond the taking of formal possession. The question as to the nature of the possession is generally one of fact, and the act will be construed with reference to the circumstance that, being for the prevention of fraud, it has a tendency to invalidate *bonâ fide* contracts (*l*).

(*h*) Allsop *v.* Day, 8 Jur, N. S. 41; Thomson *v.* Barrett, 1 L. T., N. S., Q. B. 268; Hale *v.* Met. Saloon Omnibus Co., 28 L. J., Ch. 777.

(*i*) Mather *v.* Fraser, 2 K. & J. 536; Brown *v.* Bateman, L. R., 2 C. P. 272.

(*k*) Waterfall *v.* Penistone, 3 Jur., N. S. 15; 6 El. & Bl. 876; see Hellawell *v.* Eastwood, 6 Exch. 295.

(*l*) Gough *v.* Everard, 2 H. & C. 1.

A corresponding statute (*m*) to the act of 1854 was passed for Ireland, but neither of the acts extend to Scotland.

85. A later statute (*n*) provides that the registration (which is the same as the filing mentioned in the original act) is, during the subsistence of the security, to be renewed once in every five years, commencing from the day of registration; and, if not so renewed, is to cease to be of any effect at the expiration of any period of five years during which a renewal has not been made; but where five years from the original registration of a bill of sale under the principal act had expired before the 1st January, 1867, such bill of sale was to be as valid as it would have been if the later act had not passed, if the registration were renewed before the 1st January, 1867.

86. The several forms of assignment and species of property, declared by sect. 7 of the Act of 1854 not to be within the meaning of the act, had been already declared by various decisions at law and in equity not to be within the mischief of the statute 13 Eliz. c. 5 (**325**); under which the apparent possession of chattels after assignment had been held, some years after the passing of the act, to be under the circumstances fraudulent. The act, therefore, appears simply to make registration necessary in cases which were already within the statute of Elizabeth and the authority of *Twyne's case* (*o*) (**29**). Nor does it affect bills of sale of property of which possession is delivered; but only of such as remains in the possession of the maker of the bill. Before the statute the question in ascertaining the validity of the bill of sale was, whether the transaction were *bonâ fide* or made with an intention to defeat the creditors of the assignor, and apparent possession of itself raised a presumption of fraud, the existence of which might be determined by a jury; but this not being (as appears by the preamble of the statute) a sufficient safeguard, the registration of the bill of sale was provided as a further security to the creditor, but not for giving additional validity to the

(*m*) 17 & 18 Vict. c. 55.
(*n*) The Bills of Sale Act, 1866, 29 & 30 Vict. c. 96, s. 4.
(*o*) 3 Co. 80.

instrument. The doctrine of reputed ownership arising out of the apparent possession of the debtor, is therefore not affected by the act (*p*).

Of Mortgages of Ships.

87. Mortgages of ships by the owners of them have been long regulated by statutes which have been often altered or consolidated. By the first of these which it is material to notice (and which embodied a great part of the then existing law), it was declared (*q*) that no bill of sale should be effectual to pass the property in a British ship, unless it was registered in the manner provided by the statute, but upon and from the time of registry (there being no relation back to the execution of the bill of sale) (*r*), the instrument became effectual against all persons, and for all purposes, except any of such subsequent purchasers and mortgagees as should first, after the registration of the bill of sale or other instrument under which he claimed, procure the particulars thereof to be endorsed on the certificate of registry. This endorsement was to be made, where there were at any time two or more registered transfers by the same owners of the same property in any ship, and it was directed to be made, upon the production of the certificate by the person claiming the property, within thirty days after the entry of his bill of sale in the registry, or within thirty days after the return of the vessel to her port, in case of her absence at the time of registration; and, in case of non-production of the certificate within the thirty days, the endorsement was to be made of the particulars of the bill of sale to such person as should first produce the certificate of registry. Provision was also made for granting further time for the endorsement, where it was proved that the certificate had been lost or mislaid, or was detained by any person.

When the transfer was intended only as a security by way of mortgage or assignment to trustees for sale for payment

(*p*) Per Turner, L. J., Stansfield *v.* Cubitt, 2 De G. & J. 222; Badger *v.* Shaw, 6 Jur., N. S. 377.

(*q*) 8 & 9 Vict. c. 89, ss. 37, 38, 39.

(*r*) Boyson *v.* Gibson, 4 C. B. 121.

of debts, as the case might be, the fact was directed (*s*) to be stated in the entry in the book of registry, and also in the endorsement on the certificate of registry, and thereupon the transferee was protected from the liabilities of ownership. But, subject to the loss of this protection, if the instrument of transfer were sufficient to pass the property in the ship, the transferee might have the same right of redemption where only a mortgage was intended as if the mortgage had been regularly completed, the transaction not being invalidated by non-compliance with this provision of the statute (*t*).

88. Under this statute and the statutes which preceded it, it was held that no equitable interest could be created in a British ship by an instrument not completed according to the registration acts, the very existence of such interests, apart from the legal title, appearing to be excluded in cases arising out of the contract of the parties. Wherefore, ships registered in the name of one of several partners have been held to be his separate estate, even against the creditors of the firm (*u*), although, under the statute 21 Jas. 1, c. 19, s. 11, they were held to remain within the order and disposition of the several partners (*x*). And a distinction is made where the equitable title arose from the act of God or from the operation of law; as in the transfer from the testator to his executors or the transfer to assignees in bankruptcy, which could not be carried out in the mode prescribed (*y*).

89. By the Merchant Shipping Repeal Act, 1854 (*z*), which recites that by the "Merchant Shipping Act, 1854" (*a*), the acts relating to merchant shipping are amended and consolidated, the several acts and parts of acts mentioned in the schedule, and including the act of 8 & 9 Vict. c. 89, are

(*s*) 8 & 9 Vict. c. 89, s. 45.

(*t*) Langton *v.* Horton, 5 Beav. 9; Whitfield *v.* Parfitt, 15 Jur. 852; 4 De G. & S. 240; Myers *v.* Willis, 17 C. B. 77; Gardner *v.* Cazenove, 1 H. & N. 423.

(*u*) Curtis *v.* Perry, 6 Ves. 739; Ex parte Yallop, 15 id. 60; Ex parte Houghton, 17 Ves. 251; Camden *v.* Anderson, 5 T. R. 709; Battersby *v.* Smyth, 3 Mad. 110; and as to the act 8 & 9 Vict. c. 89, see Hughes *v.* Morris, 9 Hare, 636; and 2 De G., M. & G. 349; M'Calmont *v.* Rankin, 2 De G., M. & G. 403.

(*x*) Ex parte Burn, 1 J. & W. 378.

(*y*) Ex parte Yallop, 15 Ves. 60.

(*z*) 17 & 18 Vict. c. 120.

(*a*) 17 & 18 Vict. c. 104.

repealed, saving, however, any security duly given, anything duly done, or any liability accruing, before the repealing statute should come into force.

90. The Merchant Shipping Act, 1854, provides that a registered ship, or any share therein, may be made a security for a loan or other valuable consideration, and requires that the instrument creating the security (called a mortgage) shall be in the form mentioned in the schedule, or as near thereto as circumstances will permit, and, on the production of such instrument, the registrar of the port at which the ship is registered is to record the same in the register book (*b*), in the order of time in which it is produced to him for that purpose, and is to notify on the security, by a memorandum under his hand, that the same has been received, and the date and hour of the record.

The like entry is to be made (*c*) in the register book, on production of an instrument of transfer, of the name of every transferee, as mortgagee of a ship, or shares therein, with a like memorandum of the fact, and of the date and hour of the record, on the instrument of transfer, which instrument is also to be in the form specified in the schedule.

The transmission (*d*), in consequence of death, bankruptcy or insolvency, or the marriage of a female mortgagee, or by any lawful means, other than by a transfer under the act, of the interest of a mortgagee, is to be authenticated by declaration, and evidenced according to the act; upon receipt and production of which declaration and evidence, the mortgagee is to enter the names of the persons entitled in the register book as mortgagees of the ship, or share, in respect of which the transmission has taken place (*e*).

Where a registered owner is desirous of selling or mortgaging at any place out of the country or possession in which the port of registry is situate, the registrar may grant certifi-

(*b*) Sects. 66, 67. A slight difference between the mortgage and the register, in the name of the ship, is of no consequence if there is no doubt as to identity; as where the mortgage was of the "City of Bruxelles," registered as the "City of Brussels." (Bell *v.* Bank of London, 3 H. & N. 730.)

(*c*) Sect. 73.

(*d*) Sect. 74.

(*e*) Sect. 75.

cates (*f*), giving powers of mortgage or sale, previous to the granting of which must be entered in the register book (*g*) the names of the persons by whom the power is to be exercised; and in case of mortgage, the maximum amount of charge to be created, the time within which the power may be exercised, and the place (if any be limited) where it is to be exercised, or a declaration that it may be exercised anywhere within the prescribed limits, no such power being exercisable within the United Kingdom, or in any British possession in which the port of registry may be situate, or by any person not named in the certificate (*h*).

The certificate is to be in the form mentioned in the act, and is to contain a statement of the particulars directed to be entered in the register book, and an enumeration of any registered mortgages, or certificates of mortgage or sale, affecting the ships or shares in respect of which the certificate is given (*i*).

The power must be exercised conformably with the directions contained in the certificate, and a record of every mortgage made thereunder is to be endorsed thereon by a registrar or British consular officer; and no mortgage *bonâ fide* made thereunder may be impeached by reason of the death, before the making of the mortgage, of the person by whom the power was given (*k*).

The certificate of mortgage may be cancelled by the registrar by whom it was granted upon delivery to him, and shall then become void; but before cancelling, he is to record in the register book, so as to preserve its priority, any unsatisfied mortgage which may be registered on the certificate (*l*), and also the fact of the cancellation.

Upon proof of the loss or obliteration of a certificate, and of what, if anything, has been done thereunder, or that nothing has been done, the registrar may issue a new certificate, or direct such entries to be made, or other matter or thing to be done, as might have been made or done, if there had been no

(*f*) Sect. 76.
(*g*) Sect. 77 (1) (3) (2).
(*h*) Sect. 78.
(*i*) Sect. 79.
(*k*) Sect. 80 (1) (2) (3).
(*l*) Sect. 80 (8).

loss or obliteration (*m*); and where the certificate specifies the place where the power is to be exercised, the registered owner may, by an instrument in the form mentioned in the statute, authorize the registrar who granted the certificate to give notice to the registrar or consular officer at such place that the certificate is revoked; and after such notice shall have been recorded by such registrar or consular officer, the certificate, as to any future mortgage to be made at such place, is deemed to be revoked and of none effect, and every registrar or consular officer recording any such notice shall thereupon state to the registrar who granted the certificate, whether any previous exercise of the power to which the certificate refers has taken place (*n*).

It will be observed, that, although the statute of 1854 gives more minute directions concerning the form, execution and effect of mortgages than the act of 8 & 9 Vict., it does not, like that statute, provide that no mortgage, or (as it stood there) bill of sale by way of mortgage, shall be effectual, unless it be registered, the provision being merely, that, upon production, the mortgage shall be registered; whereas, by sect. 57, bills of sale are expressly required to be produced for registration: whence it seems to have been intended that the registration of mortgages should not be necessary for the validity of the security, but only for the purposes of priority.

91. The act also provides (*o*), that no notice of any trust, express, implied or constructive, shall be entered in the register book, or be receivable by the registrar; and subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of any ship or share therein, shall have power absolutely to dispose, in manner mentioned in the act, of such ship or share, and to give effectual receipts for the consideration money. It has been held, that the assignees in bankruptcy of the owner of a ship cannot claim it against a mortgagee, whose mortgage, made before the completion of the ship, was registered after it was completed and registered by the owner; on

(*m*) Sect. 82.
(*n*) Sect. 83.
(*o*) Sect. 43.

the ground that no mortgage having been executed after the registration of the ship, the owner's title remained absolute (*p*). By the Merchant Shipping Amendment Act, 1862, it is declared (*q*) that the expression "beneficial interest," whenever used in the second part of the act of 1854 (which contains the above enactments), includes interests arising under contract and other equitable interests, and that the intention of the act of 1854 was, that, without prejudice to its provisions for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the act on registered owners and mortgagees, and without prejudice to the provisions relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property.

The act, therefore, clearly provides for the existence of equitable interests in ships. But it does not remove the necessity for compliance with the forms prescribed by the act of 1854 in order to create a valid mortgage; so that no contract for a security on a ship will be valid unless it be registered according to that act (*r*) (**1191**). Yet by virtue of the act of 1862, if not independently of it, a transfer which is registered under the former act as absolute may be shown (*s*) to have been only meant as a security, and may be so treated:

(*p*) Bell *v.* Bank of London, 3 H. & N. 730.

(*q*) 25 & 26 Vict. c. 63, s. 3.

(*r*) Liverpool Borough Bank *v.* Turner, 1 Jo. & H. 159; 2 De G., F. & J. 502; 29 L. J., Ch. 827; 30 id. 379.

(*s*) Ward *v.* Beck, 13 C. B., N. S. 668; 9 Jur., N. S. 912; The Innisfallen, L. R., 1 Adm. 72; and see Hutchinson *v.* Wright, 25 Beav. 451. And as to the rights of a purchaser whose bill of sale could not be registered because of his infancy, see Stapleton *v.* Haymen, 10 Jur., N. S. 497. It appears to have been intimated that, if an agreement for the purpose were clearly and completely proved, the court might recognize the creditor in the double character of a mortgagee for the purposes of the debt, and of an absolute owner, for the purpose of giving him control over the movements of the ship (The Innisfallen, supra); but it is conceived that the result would be only to make him mortgagee in possession, and that he could not escape from the liabilities incident to that position.

the transaction in this case being completed as the act requires, but in the other failing to comply with it.

A deposit of a registered mortgage of a ship will however create a valid security by way of equitable mortgage (*t*).

93. Before the act of 1854 a lien might have been created upon a ship's certificate of registry, notwithstanding the statutes, for the amount of costs incurred in attempting to carry out instructions for the sale of the ship (*u*). Or where the certificate had been deposited to secure advances for the ship's use, so as to prevent the owner from demanding back the certificate until payment (*x*). But that act provides (*y*) that the certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge or interest, which any owner, mortgagee or other person may have or claim in the ship; and the refusal to deliver it on demand to the person entitled to it for the purpose of navigation, officer of customs, or other person legally entitled to require it, is punishable by penalty.

It is therefore illegal to pledge the certificate, and the person entitled to it for the purpose of navigation, though himself the pledgor, may maintain an action (*z*) after demand for its delivery, and may recover damages for the wrongful detainer, in addition to his right to proceed for the penalty.

94. By 8 & 9 Vict. c. 89, s. 36, the equitable title of minors, legatees and creditors, and by the act of 1854, s. 37 (2), the beneficial title of any number of persons, or of any company represented by or claiming under or through any registered or joint owner, are expressly excepted from the effects of the rule therein contained, which limits the number of registered owners to thirty-two persons at the same time.

95. The right of an insurer of ships who is, but does not appear on the register as, the mortgagee to the proceeds of the policies is not affected by the acts (*a*). Nor, although the right to the freight is incidental to the ownership and can be

(*t*) Lacon *v.* Liffen, 4 Gif. 75; 9 Jur., N. S. 13.

(*u*) Mestaer *v.* Atkins, 5 Taunt. 381.

(*x*) Bowen *v.* Fox, 10 Barn. & Cr. 41; Clarke *v.* Batters, 1 K. & Jo. 242.

(*y*) Sect. 50.

(*z*) Wiley *v.* Crawford, 6 Jur., N. S. 1296; 1 B. & S. 253, 265.

(*a*) Ladbrooke *v.* Lee, 4 De G. & S. 106.

originally dealt with only by the owner of the vessel (*b*), is it necessary to comply with the acts in order to make a valid assignment of the present or future (*c*) freight of the ship, provided the object be carried out, not necessarily by a distinct instrument, but by a distinct contract, leaving the title to the freight in nowise dependent on the title to the ship (*d*).

In the absence of any special agreement the cargo (*e*) belongs to the mortgagor; and though the cargo of a whale ship, unlike an ordinary cargo, constitutes instead of producing the earnings of the ship, it is not incident to the employment of the ship as freight, and therefore will not pass by the assignment under the word "appurtenances," but must be expressly described or mentioned in it (*f*).

96. It being doubted whether the Court of Admiralty could take cognizance of the claims of mortgagees of ships, or of questions of title to them, where they had been arrested under the jurisdiction of the court, it was enacted (*g*), that where any ship or vessel should be under arrest by Admiralty process, or the proceeds of any ship or vessel, having been so arrested, should have been brought into and be in the registry of that court, the court should have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively. And (*h*) that the court should have jurisdiction to decide all questions as to the title to, or ownership of, any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which should be instituted in the said court after the passing of the act.

It was held (*i*), that jurisdiction was not given by this act

(*b*) Morrison *v.* Parsons, 2 Taunt. 407; Lindsay *v.* Gibbs, 2 Jur., N. S. 1039; 22 Beav. 522.

(*c*) Douglas *v.* Russell, 4 Sim. 524; 1 M. & K. 488; Re Ship Warre, 8 Price, 269.

(*d*) Mestaer *v.* Gillespie, 11 Ves. 621; Langton *v.* Horton, 1 Hare, 549; Gibson *v.* Ingo, 6 Hare, 112; Davenport *v.* Whitmore, 2 M. & Cr. 177.

(*e*) Alexander *v.* Simms, 18 Beav. 83; Branker *v.* Molyneux, 3 Scott, N. R. 332.

(*f*) Langton *v.* Horton, 5 Beav. 9.

(*g*) 3 & 4 Vict. c. 65, s. 3.

(*h*) Sect. 4.

(*i*) The Fortitude, 2 W. Rob. 217.

over all claims and causes of action of any person in respect of any mortgage of a vessel, or to decide any suit instituted by any such person (as, for instance, concerning the freight or earnings); but that the jurisdiction was only "as to the ship itself being mortgaged," which probably means that the jurisdiction was only over questions concerning the right to the ship itself. This, however, includes jurisdiction over the freight, or the fund in court which represents it (*k*).

The Court of Admiralty has now jurisdiction over any claims in respect of any mortgage duly registered according to the provisions of The Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under the arrest of that court or not (*l*).

Mortgages of ships are not affected by the act for the registration of bills of sale and assurances of chattels (*m*) (82).

Chapter I. Part 2.—Of Pledges or Pawns.

97. A pledge or pawn can be of personal property only, and is created by a delivery to the creditor of the pledge or of the evidences of title to it, as security for a debt or engagement. Or if the creditor be already in possession of the thing intended to be pledged, it will vest in him as a pledge by virtue of the contract in that behalf (*n*). But without possession the pledgee acquires no property in the pledge (*o*).

98. The pledgee is entitled to hold every separate thing which is comprised in the pledge, and also whatever, by natural increase (577), becomes accessory to it, as a security for the whole debt (*p*); but he has only a special property in the

(*k*) The Dowthorpe, 2 W. Rob. 73.

(*l*) Admiralty Court Jurisdiction Act, 1861, 24 Vict. c. 10, s. 11. See The Cathcart, L. R., 1 Ad. 314.

(*m*) 17 & 18 Vict. c. 36, s. 7.

(*n*) Story, Bailm. § 297.

(*o*) Story, Bailm. § 287. The contract of pawn is only perfected when the creditor has possession of the pledge. Hedàya, Pawns, Ch. 1.

(*p*) Story, Bailm. §§ 292, 314. Per Holt, C. J., Coggs *v.* Bernard, Lord Raym. 909.

pledge, and not, like a mortgagee (**11**), the general property (**462**). And upon payment or tender of the debt to the pledgee, the property in the goods, notwithstanding his refusal to deliver them, is instantly revested in the owner (*q*), who may bring trespass on the case upon the refusal (*r*) (**107**).

99. The property pledged may be anything of a personal nature, whether corporeal or otherwise, so that it be in existence, and capable of actual or symbolic delivery, and that the pawnor, or some person by whose consent he pawns, have a present possession and title (*s*). The delivery need not be actual, but may be constructive or symbolic—and the latter kinds of delivery may be either of goods which are, or are not, in the actual custody of the pledgor: of those which are, by delivery of the key of the warehouse in which they are contained, or of other evidence and means of obtaining possession; and of those which are not, by delivery of the documents of title, as the bill of lading of goods at sea, which will carry the right of possession even after the landing of the goods, so long as they have not come to the hands of the person entitled to receive them under the bill of lading (*t*). Or the possession of the pledgor himself may be deemed sufficient if by the contract it be made the possession of the pledgee (*u*), while that of the pledgee will not be affected by reason that the pledgor has the use of the chattel, provided it remain under the pledgee's control, and that the user be for the purpose of carrying out or be consistent with the contract (*x*) (**1480**).

(*q*) Yelv. 178; Ryall *v.* Rolle, 1 Atk. 165.

(*r*) Per Doddcridge, J., in Isaack *v.* Clark, 2 Bulst. 306.

(*s*) Story, Bailm. § 290, § 294.

(*t*) Story, Bailm. § 297; Atkinson *v.* Maling, 2 T. R. 462; Meyerstein *v.* Barber, L. R., 2 C. P. 38. In the last case the goods were landed at a sufferance wharf, at which by 11 & 12 Vict. c. XVIII. they remain subject to the same liabilities as when afloat; and see Merchant Shipping Amendment Act, 1862, s. 68. A doubt seems to have been expressed by Willes, J., whether the delivery of the key of a warehouse would be sufficient in case of a pledge, if another person afterwards obtained possession by means of a false key. In the case before him possession was obtained by the fraudulent use of the third part of the bill of lading, but it was held to be unavailing against the rights of the first pledgee. Is there any distinction in principle between the false key and the false bill of lading?

(*u*) Reeves *v.* Capper, 5 Bing., N. C. 136; per Willes, J., L. R., 2 C. P. 52.

(*x*) Crowfoot *v.* London Dock Co., 2 Cr. & M. 637.

100. It is of the essence of the contract that the thing should be held as security for some debt or engagement, either of the pledgor or of some other person; for if there be an assent by all proper parties, it is equally obligatory in each case. The pledge may be delivered as security for a future debt or engagement, as well as for a past debt; for one or many debts or engagements; upon condition or absolutely; or for a limited or indefinite time: it may be implied from circumstances, as well as arise by express agreement, and is not confined to engagements for the payment of money, but may be applied to any other lawful contract (*y*).

101. The pledgor impliedly undertakes (*z*) that he has an interest in the pledge, and that it shall be made effectual to answer the obligation. But it is not indispensable that the pledge should belong to the pledgor; it is sufficient if it be pledged with the consent of the owner, and it will be a good pledge even without his consent as between the parties. For the pledgor cannot assert that he is not the owner, and the pledgee cannot set up the *jus tertii* unless the third person enforces his own superior right of property (*a*).

But as against the real owner the pawnee will not acquire a special property in the chattel, if the person who assumes to pledge be himself without title, for the pawnee can have no greater right than the pawnor (*b*) (**580**). The mere possession, obtained through false representations, of a document of title to a chattel will not support the title of a *bonâ fide* pawnee of the chattel for value (*c*); and even where the pawnor, re-

(*y*) Story, Bailm. § 300.

(*z*) Id. § 311; per Pollock, C. B., Cheesman *v.* Exall, 6 Exch. 341.

(*a*) Id. § 291.

(*b*) Hooper *v.* Ramsbottom, 4 Camp. 121; Cheesman *v.* Exall, 6 Exch. 341; see Waller *v.* Hanger, 3 Bulst. 17. "A "custome was claymed in London, that "if any one did deliver goods in London "in pledge to another, and the goods "proved to be the goods of another, "yet that he might keep them till he "was satisfied. And held a bad cus-"tome; 35 H. 6, 26." (Sheppard's Abr. "Custome.") It is spoken of in West on Extents as a subsisting custom, but not binding the king where his goods are pledged by a stranger, on the authority of Plowden, 243, who in fact so states it; but refers to Bro. Abr. Prerog. 5, where it is only said that the king is not bound by sale in market overt; and of Fitzh. Cust. 2, where the custom was said to be bad, but that the king would not have been bound by it if it were good. (See Hartop *v.* Hoare, 3 Atk. 52.)

(*c*) Kingsford *v.* Merry, 26 L. J., Exch. (N. S.) 83; 1 H. & N. 503.

maining in possession for a limited purpose under the original contract of pawn, or by the fraudulent use of a document of title, affects to pledge the chattel to another, the right remains in the first pawnee, though the second have actually obtained possession and have sold the chattel (*d*).

So if the pawnor be tenant for life or for years the pledge will only be coextensive with his interest, and the pawnee will have no further claim upon the chattels after the determination of that interest, though he had no notice of the settlement (*e*). And the bailee of goods of tenants in common cannot by the direction of one of them justify a pledge of the whole (*f*).

102. If there be no stipulation to the contrary, the pawnee may by common law, even before condition broken, deliver over the pawn into the hands of a stranger for safe custody without consideration; or he may sell his interest in the pawn, or assign it conditionally by way of pawn, without destroying or invalidating the security (*g*). But if he pledge property, not being a negotiable security (for the lawful possessor of such a security may either pledge or sell it, so as to bind the rights of the owner (*h*)), for a debt beyond his own, or make a transfer thereof to his own creditor as if he were absolute owner, he becomes guilty of a breach of trust (*i*). The creditor acquires no title beyond that which belonged to the original pawnee, and if he refuse to deliver the property to the pawnor after tender to the pawnee or his personal representative he becomes liable in detinue, or for damages sustained by the improper act (*k*).

The mere refusal to redeliver the pledge to the pawnor is not however a conversion; it is for the jury to say whether

(*d*) Reeves *v.* Capper, 5 Bing. N. C. 136; Meyerstein *v.* Barber, L. R., 2 C. P. 38. Per Martin, B.: The sale by a person allowed by the true owner to have possession of the goods, so that he is able to hold himself out as owner, probably only binds the true owner where the possessor, from the nature of his employment, had primâ facie a right to sell. (Higgins *v.* Burton, 26 L. J., Exch. (N. S.) 342.)

(*e*) Hoare *v.* Parker, 2 T. R. 376.

(*f*) Barton *v.* Williams, 5 B. & Al. 395; 3 Bing. 139; 10 Moore, 596.

(*g*) Story, Bailm. § 324. See per Cook, Warburton, and Daniel, in Mores *v.* Conham, Owen, 123.

(*h*) Story, Bailm. § 296.

(*i*) Id. §§ 295, 324; Ratcliff *v.* Davies, Cro. J. 244; Yelv. 178; Mores *v.* Conham, supra.

(*k*) Donald *v.* Suckling, L. R., 1 Q. B. 585.

the holder intended to apply it to his own use, to assert the title of a third person, or only to ascertain the true ownership, and in the latter case whether a reasonable time had elapsed for that purpose (*l*). And the wrongful conversion does not destroy the contract or the special property created by it, which remains until redemption or sale by virtue of the contract of pawn (**905**).

Therefore where, upon non-payment on a certain day, the pledgee was empowered to sell, but sold before and delivered upon that day, although it was held to be a wrongful conversion, the interest of the pledgee in the property was considered not to have been destroyed; and as it appeared that the pledgor never intended to redeem, his right to damages was treated as only nominal, and as if he had sued on a breach of contract for not keeping the pledge till the day fixed (*m*). And again, where the pawnee had repledged for a larger sum than was due to him on the original pawn, it was held that the first pawnor could not bring detinue against the second pawnee, without tendering the amount due to the first pawnee (*n*).

103. If the pledgor be not the true owner of the chattel, and have no special property in it which he may assert against the true owner, the pawnee may deliver the chattel to the latter (*o*); being however answerable in damages, though they may be only nominal, if he have absolutely contracted to redeliver it to the pawnor (*p*). Or, if the pawnor held the chattel merely as a pledge from the true owner, the second pawnee may discharge himself by delivering it to his own pawnor, at any time before an offer by the true owner to redeem (*o*).

104. An agreement that the pledgee shall have a power of sale appears not to alter the general nature of the transaction (*q*), or to turn it into a mortgage (**905**).

(*l*) Vaughan *v.* Watt, 6 M. & W. 492.

(*m*) Johnstone *v.* Stear, 15 C. B., N. S. 330; 10 Jur., N. S. 99; see Chiney *v.* Viall, 5 H. & N. 288; Brierly *v.* Kendall, 17 Q. B. 937; Story, Bailm. § 315.

(*n*) Donald *v.* Suckling, supra.

(*o*) Story, Bailm. § 340.

(*p*) Per Pollock, C. B., in Cheesman *v.* Exall, 6 Exch. 341.

(*q*) Franklin *v.* Neate, 13 M. & W. 481.

105. In cases of executions against private persons, a creditor of the pawnor cannot take the pledge from the pawnee, without first discharging the pawnee's claim, or otherwise extinguishing his title (*r*). It is said, that if A. gage goods to B., and afterwards A. is attainted of felony, the king shall not have the goods thus gaged without payment of the sum for which they were gaged; for his prerogative shall never prejudice another: and again, if the pawnor be utlagatus, the king shall not have the goods before the party be satisfied (*s*).

106. As to the right of distress or execution against the pawn, in the hands of the pawnee, for his own debt, the pawn is protected in the case of a professional pawnbroker upon the principle generally applicable to goods intrusted to persons who carry on a public trade, and who manage and deal with goods in the way of their trade (*t*); as well as because the pawnee is bound to restore the pledge upon redemption, (**98**) which appears to be a sufficient ground for protection in the case of a general pawn.

107. The pledgor by virtue of his general property may also sell and transfer to the purchaser all his right in the pledge; and if on tender by the latter of the amount due to the pledgee he refuse to deliver the pledge, the purchaser has a remedy in trover as well as in equity for redemption (*u*).

108. The business of professional pawnees or pawnbrokers, (that is, of persons who keep a place for the purchase or sale of

(*r*) Story, Bailm. § 353.

(*s*) Nichols *v.* Nichols, Plowden, 477, per Harper, J.; Vin. Abr. Pawn.; Waller *v.* Hanger, 3 Bulst. 17. It is said by Story, Bailm. § 353, citing Chitty, Prerog. ch. XII. pt. 1, s. 5, who took the assertion from West on Extents, that in the case of the crown the pawn may be taken generally in satisfaction of the debt to the pawnee, or taken and sold subject to his right; Bro. Abr. "Pledges," and other authorities are cited by West, but do not appear to bear out the statement.

(*t*) Swire *v.* Leach, 18 C. B., N. S. 479; 11 Jur., N. S. 178. The protection of the pledge from distress is probably of great antiquity. It was provided by the forest laws, that "if a man "who is amerced doth afterwards pawn "or pledge the cattle which be in the "forest to another, in such case the "beadle cannot distrain the same so "long as they are in pawn." (Manwood, 103, § 14.) So the Hedàya says, "it "is recorded in the traditions, that no "pledge shall be distrained for debt." (Pawns, Ch. 1.)

(*u*) Franklin *v.* Neate, 13 M. & W. 481; Story, Bailm. § 350.

goods and chattels, or for taking in goods or chattels by way of security for advances, and who purchase or receive any such, and advance thereon any sum not exceeding £10, with an express, implied or inferable agreement or understanding, that the goods may be redeemed or repurchased (*x*)), is regulated by several statutes (*y*), which limit the amount of profits according to specified rates, compel the pawnbrokers to make entries of their transactions, to give a note to the pawnor containing the name and address both of pawnor and pawnee, a description of the pawn, the amount and date of the advance, and other particulars; the compliance with which, though enforced by penalties, being also a condition precedent, the pawnbroker acquires no property in the pledge if he neglect to observe them (*z*).

Upon redemption, the pawnbroker is also required to indorse the amount of profits on the duplicate (*a*), and to keep the duplicate in his custody for a year following.

Penalties are enacted against the unlawful pawning of the goods of others, and the forgery of the notes; and other regulations are made for the protection both of the pawnors and pawnees, including provisions binding pawnbrokers to restore goods unlawfully pawned, to submit to searches on their premises for such goods, and to deliver up pledged goods to the owners on tender of the principal and the profit within the period mentioned in the act (*b*). Unredeemed goods are deemed to be forfeited at the end of a year, and pawnbrokers are bound to take out licences for the exercise of their trade (*c*).

(*x*) 19 & 20 Vict. c. 27, s. 1; and see Fitch *v.* Rochfort, 1 Mac. & G. 184.

(*y*) 39 & 40 Geo. 3, c. 99, ss. 2—6; 23 Vict. c. 21. The statutes and statutory offences, with much other valuable information upon the subject, will be found in Turner's Contract of Pawn, 1866.

(*z*) Ferguson *v.* Norman, 5 Bing., N. C. 76.

(*a*) 39 & 40 Geo. 3, c. 99, s. 7.

(*b*) Same act, and 9 & 10 Vict. c. 98; see also 22 & 23 Vict. c. 14.

(*c*) 25 Geo. 3, c. 48; 55 id. c. 184; 19 & 20 Vict. c. 27.

Chapter I. Part 3.—Of Securities by way of Bottomry and Respondentia.

109. Bottomry, or, as it was called in the law French, *bottomage*, is a security, some form of which has been used among maritime nations from remote antiquity, and by which, formerly, the keel or bottom of the ship as representing her entire fabric, rigging and stores, and now, more often, all these specifically, are made a security for the repayment of money advanced for the repairs of the ship, or for other purposes necessary for the safe prosecution of her voyage.

The term "hypothecatory" is commonly applied to bottomry securities. But in strictness the legal interest in the subject of the contract passes by hypothecation (*d*), while the contract of bottomry transfers no property, but only gives a privilege or claim, which is to be carried into effect by legal process at the end of the voyage (*e*).

110. This kind of security, which in the Court of Admiralty and in equity is a negotiable instrument (*f*), but is not assignable at law so as to enable an assignee to sue upon it in his own name, is commonly called a bottomry bond; and though neither the form of a bond, nor any other particular form (*g*), is necessary to its validity, it may properly be so made, binding the master and his representatives, and also the ship, her tackle, apparel, furniture and freight (though this last, receiving part of the benefit, appears, like the parts of the ship itself, to be liable whether specifically mentioned or not (*h*)), and if necessary the cargo also, for the repayment of the loan; and conditioned to be void on repayment of the principal with the stipulated amount of maritime interest,

(*d*) Colquhoun, Sum. Rom. Civ. Law, § 1465.

(*e*) Johnson *v.* Shippen, 2 Lord Raym. 982; Stainbank *v.* Fenning, 15 Jur. 1082; 11 C. B. 51; Stainbank *v.* Shepard, 17 Jur. 1032.

(*f*) The Rebecca, 5 Rob. A. R. 102; The William, Swab. 346; 31 L. T. 345.

(*g*) It may even be in the form of a bill of sale, for it cannot operate strictly as such for want of power in the maker. (Johnson *v.* Shippen, supra.)

(*h*) The Prince Regent, cited 2 W. Rob. 83; The Dowthorpe, id. 73.

within a certain time after the arrival of the ship at her destination, the money being lost in case of the loss or destruction of the ship on the voyage by any of the perils mentioned in the contract (*i*). The essence of the transaction is that there shall be a maritime risk to be ascertained from the contents of the instrument (*j*).

111. The power to make a valid contract of bottomry is generally vested in the master of the ship alone; but in case of his permanent absence or incapacity, it may be exercised by the master by succession or substitution, appointed by the person who takes charge of the ship (*k*). And a bond executed in a foreign port by the British consul, who had appointed a new master, was supported though it was not executed by the latter (*l*).

The power is based upon the necessity of acting by an agent, where no contract can be made by the owner; and where money or other supplies being required for the use of the ship, the master can obtain them upon no other terms; and it can be used only for the benefit of the ship and cargo (*m*). Except in cases of fraud the right of the master to make a second bottomry bond will not be interfered with, although the effect will be to injure the first bondholder (*n*) (**1268**).

112. The power of raising money on bottomry is not confined to the ship and freight; in case of necessity, but still acting as the agent of the shipowner (*o*), the master may also hypothecate the cargo; the measure of the necessity being the degree of damage, and the extent of the advances required, as compared with the sufficiency of the ship and freight alone

(*i*) The Atlas, 2 Hag. A. R. 48.

(*j*) Per Dr. Lushington, L. R., 1 Ad. 14.

(*k*) Parmeter *v.* Todhunter, 1 Camp. 541; The Alexander, 1 Dods. A. R. 278; The Zodiac, 1 Hag. A. R. 320; The Kennersley Castle, 3 Hag. A. R. 1; The Rubicon, id. 9. "*Dodderidg* " accord que si le master, purser, factor, " ou cestuy en le nief que luy pretend " owner, apprompt argent pur tiel " purpose sur bottomage, ceo lya " l'owner del nief." (Scarborough *v.* Lyrus, Latch. 252.)

(*l*) The Cynthia, 16 Jur. 748.

(*m*) Brixton *v.* Snee, 1 Ves. 154; Hussey *v.* Christie, 13 Ves. 598; Lyall *v.* Hicks, 27 Beav. 616; Duranty *v.* Hart, 2 Moo. P. C., N. S. 289.

(*n*) The Armadillo, 1 W. Rob. 251.

(*o*) But note that the master is not the agent for the cargo, except by contract or necessity, and he has no power over it until it be put on board. A bottomry bond made before that event upon ship, freight and cargo is therefore void as to the cargo. (The Jonathan Goodhue (Dibble), Swab. 355.)

to bear such advances (*p*). The cargo, however, cannot be bottomried without the ship and freight, because it is upon them that the burden must first fall; though, upon the ground of an intention to include the ship and freight, it seems (*q*) that a security on the cargo alone may be good. The shipowner, moreover, by the English law, remains liable to the owner of the cargo for whatever the latter may have been obliged to pay by reason of the insufficiency of the ship and freight to pay the sum due on the bond, and this whether the ship and cargo are made liable by the same or by different instruments (*r*). In this respect, therefore, the master has power, by the law of England, to bind the shipowner personally; but his power to do so is exceptional, and is subject to the law of the flag under which he sails, of which law the flag is notice (*s*).

113. The ship alone, or the ship with the freight and cargo when the latter are included, are practically liable for the debt, the liability of the master, who is commonly unable to pay, being treated as only nominal; though it may be enforced, and in questions of priority of liens is treated as a subsisting liability (*t*). The repayment should therefore be made to depend upon the safe arrival of the ship, and the contract will be avoided by a condition for payment upon any other terms (*u*). The owners cannot generally (**112, 129**) be made personally liable (*x*), save so far as the master, where he is one of them, may be bound; and a prohibition will lie to a suit against them (*y*). But if the bond be so framed as to bind the owners, the court may reject that part of the instrument and may proceed against the security (*z*).

(*p*) The Gratitudine, 3 Rob. A. R. 240; The Lord Cochrane, 2 W. Rob. 320; 8 Jur. 714; Benson *v.* Duncan, 1 Exch. 537.

(*q*) La Constancia, 2 W. Rob. 404.

(*r*) Benson *v.* Duncan, 1 Exch. 537; 3 id. 644.

(*s*) Lloyd *v.* Guibert, L. R., 1 Q. B. 115; 10 Jur., N. S. 948. In France it seems that the shipowner may relieve himself from the consequences of the master's engagement by abandoning the ship and freight.

(*t*) See the Jonathan Goodhue (Jones), Swab. 524.

(*u*) Stainbank *v.* Fenning, 15 Jur. 1082; 11 C. B.. 51; Stainbank *v.* Shepard, 17 Jur. 1032; The Atlas, 2 Hag. 48; The Emancipation, 1 Rob. A. R. 124. Notwithstanding Sampson *v.* Braggington, 1 Ves. 443.

(*x*) Stainbank *v.* Fenning, supra.

(*y*) Johnson *v.* Shippen, 1 Salk. 35; 2 Lord Raym. 982.

(*z*) Stainbank *v.* Fenning, The Tartar, 1 Hag. A. R. 1; The Nelson, id. 169.

114. The supply of necessities which prevent the ship from proceeding on her voyage, is the object and the justification of bottomry. The security therefore will not be invalid by reason of the alleged illegality of the voyage (*a*). But the ship ought to be engaged in a voyage which was within the contemplation of her owner (*b*), whether the adventure consist of that voyage alone, or of that with other voyages; and it seems that the bond will not be valid if given for a voyage which is made without the knowledge of the owner or beyond the authority of the master. Yet with the owner's consent, and under such circumstances as usually justify bottomry, a ship may be bottomried in a foreign port for the repairs and outfit necessary for a new voyage, though not for a new voyage from a home port (*c*); the distinction being, that in the one case a secret lien which might affect subsequent bonâ fide mortgagees would be created without necessity and contrary to the policy of the statute law, that all incumbrances should appear on the ship's papers, while the other proceeding is as reasonable and necessary as an advance for a voyage home.

The particular voyage upon which the risk is incurred ought to be stated in the bond, which will not be discharged by a loss happening in the course of an unnecessary deviation (*d*). If, however, the voyage be not under the absolute discretion of the master, as in the case of a vessel in government employ, the bond will not be bad for want of a correct, particular description, if the voyage be described as nearly as may be (*e*).

115. The money may be raised for the repairs of the ship (into the items of which the court will not minutely examine(*f*)), and for the payment of all necessary charges in and about the ship and crew, to enable her to prosecute her voyage, including port dues and lights; and also for payments arising through extraordinary peril or misfortune, as for salvage, or expenses incurred by the authorities at a foreign port in investigating a mutiny, and replacing the master in

(*a*) The Mary Ann, L. R., 1 Adm. 13.

(*b*) The Mary Ann, 10 Jur. 253; but see L. R., 1 Adm. 14.

(*c*) The Royal Arch, Swab. 269; per Holt, C. J., 2 Lord Raym. 982; see The Jenny, 2 W. Rob. Ad. 5.

(*d*) 1 Eq. Ca. Abr. 372.

(*e*) The Jane, 1 Dods. A. R. 461.

(*f*) The Royal Arch, Swabey, 269.

command, or for the services of the British consul (*g*). But not for payments in respect of liabilities for damage to the cargo, and which are unnecessary for the purposes of the ship, though the master may be liable to be arrested in respect of them (*h*); nor for debts incurred by the master himself in respect of the ship, for until the passing of some modern statutes he had not even a lien for money expended by himself for repairs, furniture or stores (*i*), or for his wages (*k*); nor for general average contribution in respect of an outward voyage (*l*), or other charges relating to the outward cargo, even though properly owing by the owner of the ship, unless the ship could be arrested for them (*m*) (**236, 237**).

116. If a bottomry bond be paid off, the amount may be included in a new bond given during the same, but not during a subsequent voyage; nor can the master of his own authority borrow upon bottomry for a debt incurred for the purposes of a former voyage, nor for supplies to other ships of the same owner (*n*); but at a distant port he may do it for a return voyage in respect of debts incurred on the outward voyage, even where the homeward voyage is circuitous (*o*). An hypothecation of the freight also is not necessarily confined to the freight on the particular voyage, but in certain cases (as where the original voyage was varied so that the creditor could not then proceed on the bond, and the freight was accounted for to the owners) it may be extended (*p*) to make liable to the creditor the freight earned on a subsequent voyage.

Freight earned from subshippers of cargo is liable on a bottomry bond given after the date of the charter-party (*q*).

(*g*) Wallace *v.* Fielden, 7 Moo. P. C. 398; Stainbank *v.* Fenning, 11 C. B. 51; Beldon *v.* Campbell, 6 Exch. 886; The Edmond, 30 L. J., Ad. 128; Parmeter *v.* Todhunter, 1 Camp. 541; The Gauntlet, 3 W. Rob. 82; The Zodiac, 1 Hag. A. R. 320.

(*h*) Smith *v.* Gould, 4 Moo. P. C. 21.

(*i*) Hussey *v.* Christie, 9 East, 426, though Lord Eldon seems to have thought otherwise; S. C., 13 Ves. 594; Smith *v.* Plummer, 1 B. & Al. 575.

(*k*) Gibson *v.* Ingo, 6 Hare, 112.

(*l*) The North Star, 1 Lush. 45.

(*m*) The Edmond, 1 Lush. 57; The Prince George, 4 Moo. P. C. 21.

(*n*) The Toivo, 1 Ecc. & Adm. 185; The Lochiel, 2 W. Rob. 45; The Osmanli, 3 W. Rob. 198; The Edmond, supra.

(*o*) The Edmond, supra.

(*p*) The Jacob, 4 Rob. A. R. 245.

(*q*) The Eliza, 3 Hag. A. R. 87.

117. As a general rule, the money ought to have been lent in contemplation of bottomry, and if at first it be lent on the credit of the owner (*r*), or to pay for work already done, and in respect of which no stipulation for bottomry was made (*s*), a subsequent security of that kind will be void. Nor can a purchaser of the debts of the ship, originally contracted upon credit, secure them by bottomry. Small advances, however, made before the bond was in contemplation may be included therein, if they were not made on the credit of the owner (*t*); and a bond may be given to a person who has pledged his credit for the expenses of the ship, though no money have actually been paid (*u*).

A bottomry bond may also be upheld where, although there was no agreement for bottomry, there was also none that the money expended should be lent on personal security, and the ship being liable under the law of the country for the expenditure, the right to take advantage of that law had not been repudiated by the creditor (*x*).

118. The bond will not be invalidated by taking bills of exchange as collateral security where bottomry was the original object (*y*), though where bills form the only written contract they are *primâ facie* evidence that no security was intended to be given upon the ship (*z*); and the bond may be valid for part only of the advance, as if the master having resources at a certain port take up money on bottomry for the use of the ship without reckoning those resources, or if he take it up for purposes which may not as well as for such as may properly be supplied by bottomry. The amount properly chargeable in such cases upon the bond will be ascertained by inquiry (*a*).

(*r*) The Augusta, 1 Dods. A. R. 283; The Wave, 15 Jur. 518; Gore *v.* Gardner, 3 Moo. P. C. 79; The Hebe, 2 W. Rob. 413; The Ocean, id. 429, 465.

(*s*) Beldon *v.* Campbell, 6 Exch. 886.

(*t*) The Vibilia, 1 W. Rob. 1; The Trident, id. 29.

(*u*) The Royal Arch, Swabey, 269.

(*x*) The Alexander, 1 Dods. 278; The Laurel, 11 Jur., N. S. 46; and see The Prince George, 4 Moo. P. C. 25.

(*y*) The Augusta, 1 Dods. A. R. 283; The Emancipation, 1 W. Rob. 124; The Jane, id. 461; Stainbank *v.* Shepard, 17 Jur. 1032.

(*z*) Ex parte Halkett, 19 Ves. 474.

(*a*) Dobson *v.* Lyall, 2 Ph. 323, n.; The Heart of Oak, 1 W. Rob. 204; Smith *v.* Gould, 4 Moo. P. C. 21.

119. Those who make advances for a ship ought to give notice to the master that a bottomry security will be required, in order that discretion may be used in so expensive a proceeding; and if they have corresponded with the owners of ship or cargo, or might have done so, and have given no notice of an intention to take a bond, it may be inferred that the money was advanced without such intention (*b*).

120. The lender on bottomry is not bound to judge as to the existence of the necessity, to supply which the money is to be raised, unless there be palpable fraud (*c*); but he is bound to use reasonable diligence in ascertaining whether the supplies could not be had on the personal credit of the owner (*d*). Although the master ought to advertise before taking the bond, his neglect to do so will not alone invalidate it (*e*), nor will the putting up of the bond at public auction justify the lender in abstaining from inquiry; the chief object of such a proceeding by the master being to get the money at the lowest rate of interest. If, on the other hand, proper inquiries be made, though without success, the bond will be good, even if the supplies were not necessary or might have been had upon personal credit (*f*). If the lender had notice from the owner's agent not to make the advances, the security will of course be void (*g*).

121. Advances on bottomry by a debtor to the ship on account of which the advances are made will remain uncovered by the security to the extent of the debt (*h*), because if the debtor can make the advances he can also pay the debt, and then the master is not without those resources the want of which alone will justify bottomry.

The owner's agent may however take a bottomry bond where it is otherwise proper, and the taking it by the agent will not injure the owner (*i*).

122. The master being bound before borrowing on bottomry

(*b*) The Wave, 15 Jur. 518.
(*c*) The Vibilia, 1 W. Rob. 1.
(*d*) Heathorn *v.* Darling, 1 Moo. P. C. 5.
(*e*) The Laurel, 11 Jur., N. S. 46.
(*f*) Soares *v.* Rahn, 3 Moo. P. C. 1; The Faithful, 31 L. J., Ad. 81.
(*g*) The Faithful, supra.
(*h*) The Hebe, 2 W. Rob. 413.
(*i*) The Oriental, 14 Jur. 336; 7 Moo. P. C. 408; see The Royal Arch, Swabey, 269; The Lord Cochrane, 8 Jur. 714.

to communicate, if possible, with the owner, it was formerly considered (*k*) that the contract could be good only where the owner and the master were in parts foreign to each other; but latterly, the absolute necessity of the case, without reference to the place of the owner's residence, has been treated as the proper test (*l*); and bottomry bonds made in British ports, or in ports of the country in which the owner lives, may be good if he be absent or if no communication can be had without great delay and damage, while a bond made in a different country from that of the owner may be bad if the communication were easy and quick (*m*), the policy of the law being based more upon the difficulty of communication than upon the position of the port. It appears, indeed, to have been thought by Lord Cottenham that in a foreign port a master may raise money on bottomry without communicating with the owner, though there was time for him to do so (*n*), thus keeping up the distinction as to foreign ports, although the reason for it—viz., the necessity of the case—may not exist; but it has since been established that the consent of the owner must be had if it be possible to communicate with him (*o*). Every port in the United Kingdom of England and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of the Queen, is now a home port as regards all repairs done to or supplies furnished for ships (*p*).

123. Before hypothecating the cargo, the master, whose character of an agent ceases with the necessity which creates it, ought if possible to communicate, or attempt to communicate, with the owner or consignee of the cargo, as well as with the owner of the ship (**128**); and the lender should as far as possible satisfy himself that such communication has taken place; but the necessity for the communication is so far governed by

(*k*) Watkinson *v.* Bernadiston, 2 P. W. 367; Ex parte Shank, 1 Atk. 234.

(*l*) The Trident, 1 W. Rob. 29; The Ysabel, 1 Dods. A. R. 273; and see Johns *v.* Simons, 2 Q. B. 425.

(*m*) Wallace *v.* Fielden, 7 Moo. P. C. 398; see also The Lochiel, 2 W. Rob. 34; The Barbara, 4 Rob. A. R. 1.

(*n*) Glascott *v.* Lang, 2 Ph. 310.

(*o*) The Oriental, 7 Moo. P. C. 408.

(*p*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 8). For Scotland same year, c. 60, s. 18.

the circumstances in which the ship and the master are placed, that he may be justified in acting without the communication, where from the distance between the places, the position of the ship, the necessity for immediate action, or other like circumstances, the safety of the property would be endangered by waiting for instructions (*q*). The master is not bound to tranship the cargo before raising money on bottomry, though it is in his discretion to do so (*r*).

124. Though it be absolutely necessary to the validity of a bottomry bond that there should be maritime risk, it is not necessary that any particular rate of interest should be reserved (*s*); the reservation of an ordinary rate of interest only raises an inference that bottomry was not intended, because of the greatness of the risk. If maritime risk be intended but not incurred, interest calculated upon such risk will, it seems (*t*), be cut down to the ordinary rate of interest. And the court will cut down the premium where the amount reserved appears to be excessive, referring it to the registrar and merchants to fix the amount proper to be allowed (*u*). But it will not pronounce against the bond on account of the largeness of the premium (*x*), or of the commissions charged, except so far as the amount of them may be a ground upon which it may be impeached for fraud (*y*).

But the bond will be enforced if the master fraudulently neglect or refuse to complete his voyage, or if the voyage having been begun remain incomplete, through circumstances beyond the bondholder's control (*z*). And where the whole risk has not been incurred the interest can be severed; but this will not be done as of course.

(*q*) The Bonaparte, 8 Moo. P. C. 459; 14 Jur. 605; The Gratitudine, 3 Rob. A. R. 257; Cargo ex Sultan, 5 Jur., N. S. 1060; The Oriental, 7 Moo. P. C. 398; The Olivier, 1 Lush. 484; The Hamburg, Duranty *v.* Hart, 9 Jur., N. S. 445; 2 Moo. P. C. (N. S.) 289.

(*r*) The Lord Cochrane, 8 Jur. 714.

(*s*) The Emancipation, 1 W. Rob. 124; The Royal Arch, Swab. 269; see Law Rep., 1 Adm. 14; The Laurel, 11 Jur., N. S. 46.

(*t*) De Guilder *v.* Depeister, 1 Vern. 263.

(*u*) The Huntley, 1 Lush. 24.

(*x*) The Lord Cochrane, 8 Jur. 714.

(*y*) The Laurel, 11 Jur., N. S. 46.

(*z*) The Armadillo, 1 W. Rob. 251; The Dante, 2 W. Rob. 427.

125. The bond when due should be enforced within a reasonable time. If a new agreement be made by which the time of payment fixed in the bond is postponed, it has no more validity as a bottomry bond. The contract is then only personal, not founded on the necessity of the ship, and the Court of Admiralty has no jurisdiction over the substituted contract (*a*).

126. The validity of the bond is determined by the general law maritime (*b*), as to any question relating to the obligatory effect of the bond upon persons who are not subjects of the state in which it was made, and not by the municipal law of that state. Where the transaction is clearly of the character of and is made under the conditions which we have seen to be essential to bottomry, there is a strong legal presumption of its validity, until it be shown that there was fraud, or that the money was really advanced upon different considerations. And in deciding upon its validity the effect of the law of the country in which it was made may be considered. Hence, where a foreign creditor had in his own country a lien on the ship for an advance, it was held that an inference arose in favour of bottomry, because without some such consideration he would not be likely to abandon his lien and trust to the credit of a stranger in a foreign land (*c*).

127. Though no form is necessary for the completion of the contract, an instrument which is *intended* to pass a legal or equitable right in a ship, but fails so to do, cannot (*d*) be set up as a bottomry security, but it seems that it may operate as such notwithstanding that it is in the *form* of an instrument which purports to transfer the property in the ship (*e*). The circumstance that it is under seal will not affect its validity (*f*).

128. As bottomry is an hypothecation of the ship and freight, or of the ship, freight and cargo, so *Respondentia*

(*a*) The Royal Arch, Swabey, 269.

(*b*) The Bonaparte, 14 Jur. 605; 8 Moo. P. C. 459; The Royal Arch, supra.

(*c*) The Vibilia, 1 W. Rob. 1; see The Laurel, 11 Jur., N. S. 46.

(*d*) Ridgway *v.* Roberts, 4 Hare, 106; and see The Wave, 15 Jur. 518.

(*e*) Johnson *v.* Shippen, 1 Ld. Raym. 982; 6 Mod. 79.

(*f*) Menetone *v.* Gibbons, 3 T. R. 267.

relates to the cargo alone (*g*). The two kinds of security are founded upon the same necessity of borrowing money for the preservation of the property, and are subject to the same jurisdiction and governed by the same principles; and if the circumstances be such that in the judgment of the master of the ship it is proper to tranship the cargo, he may borrow money to pay the expenses of transhipping and forwarding it by pledging the cargo on *Respondentia* apart from the ship, just as in a like case of necessity he might hypothecate the ship by way of bottomry.

129. Although, as in cases of bottomry, it is generally necessary to give notice to the owners of the cargo (**123**) before raising money on *Respondentia*, yet if the owners are very numerous and remote, and the difficulty and expense of preserving the cargo (pending the communication) are so great that the loss of the property would probably be the consequence of enforcing the rule, the want of notice to the owners will not invalidate the bond.

130. *Respondentia* securities, unlike such as are made on bottomry (**113**), bind the owners personally; and though according to general usage the cargo will also be liable, yet the contract may be in such a form that the cargo is free and the owners alone bound (*h*).

131. It is only in the Court of Admiralty, which proceeds in rem, that the obligee of a bottomry bond can enforce his rights, and a court of common law will not by prohibition restrain the Admiralty Court from giving relief against the property, even though it be alleged that the obligee is proceeding collusively to defeat the remedies of the shipowner in another action, holding that this should be remedied by an application to the Admiralty Court itself (*i*); but a prohibition will be granted in respect of a proceeding in that court against the owner personally (*k*). And if justice requires that before

(*g*) Cargo ex Sultan, 5 Jur., N. S. 1060.

(*h*) 2 Bl. Com. 458; Busk *v.* Fearon, 4 East, 319.

(*i*) Ex parte Place, 1 C. L. R. 45.

(*k*) Johnson *v.* Shippen, 2 Ld. Raym. 982.

payment of the bond a more complete investigation should be had into the circumstances under which it was given, than the forms or state of the proceedings in the Admiralty Court will allow, and there are equities which the Court of Chancery only can determine, and that court has already jurisdiction over the matter, it will restrain the proceedings on the bond in the Court of Admiralty (*l*).

(*l*) Duncan *v.* M'Calmont, 3 Beav. 409.

CHAPTER II.

OF SECURITIES WHICH ARISE BY OPERATION OF LAW.

PART 1.—OF JUDGMENT AND OTHER STATUTORY LIENS.
PART 2.—OF LIENS WHICH DO NOT DEPEND UPON POSSESSION.
PART 3.—OF LIENS WHICH DEPEND UPON POSSESSION, AND HEREIN OF GENERAL AND SPECIFIC LIENS.

PART 1.—OF JUDGMENTS AND OTHER STATUTORY LIENS.

132. *Of Judgments.*
141. *Of voluntary Judgments.*
154. *Of Charging Orders.*
162. *Of Decrees or Orders for Payment of Money.*
172. *Of the Registration of Judgment Liens.*

Of Judgments.

132. A judgment debt is a debt which, having been established by the judgment of some one of certain courts of justice (**162, 168, 170**) or by the acknowledgment of the debtor, may be enforced by execution against the real and personal estate of the latter. The creditor, by virtue of a judgment, acquires a fixed right against the property of his debtor, which can only be discharged by release or satisfaction, and cannot be defeated by the act of the owner of the estate.

133. By virtue of the statute 13 Edward 1 (Westminster 2nd), c. 18, which extended the remedies of judgment creditors, a judgment became a general charge upon all lands which the debtor had at the time of entering up the judgment, and which he subsequently acquired; but, his right to execution at law being limited by the statute to one moiety of the land, his remedy in equity, where legal execution could not be had, was similarly restrained.

Copyholds and several other species of realty were not included in the act, and leaseholds and other chattels were not affected until execution sued out. As to freeholds, it was said to be necessary for the creditor to sue out his elegit (*a*) before he could make his charge available in equity, where no assistance was given until the applicant had done his best to complete his title at law (*b*).

134. By the 10th section of the Statute of Frauds, the sheriff was empowered to deliver execution to the judgment creditor of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person might be seised of in trust for the judgment debtor, as if the latter had himself been seised of such estate as the trustee was seised of in trust for him at the time of the execution sued; the hereditaments to be held by virtue of the execution free from incumbrances by the trustee. But this statute did not include the equity of redemption, or other equitable interest in a term of years (*c*), or the equity of redemption in freeholds; being only applicable where the debtor had the whole beneficial interest (*d*). And the words "at the time of the execution sued" referred to the seisin of the trustee; so that, though the legal estate

(*a*) When debt is recovered or knowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages to have a writ of fieri facias unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one half of his land, until the debt be levied upon a reasonable price or extent; and if he be put out of that *tenement* he shall recover by writ of novel disseisin, &c. (Stat. Westminster 2nd, 13 Edw. 1, st. 1, c. 18.) Hence the writ of execution against land is called an *elegit*. When the sheriff has issued the first writ of *elegit*, there is no interest left in the debtor which amounts to a *tenement* within this statute, or which the law recognizes as an estate or interest capable of being taken under a second writ. (Carter *v.* Hughes, 2 H. & N. 714, per Martin, B.)

(*b*) Neate *v.* Duke of Marlborough, 3 My. & C. 407; Mitf. Pl. 149, ed. 5. But this doctrine as to freeholds is said to have been dissented from by Lord King, Lord Eldon, and Sir J. Leach, V. C. E., and to have been disavowed by Lord Redesdale himself, who thought the rule only applied to leaseholds and other personalty, and that a judgment creditor might file a bill in respect of his lien on freeholds without suing out an elegit or proceeding to execution. (Townshend *v.* Agnew, 3 L. J. 200, 3 M. & C. 410, n.)

(*c*) Lyster *v.* Dolland, 1 Ves. J. 431; Scott *v.* Scholey, 8 East, 467. But an equity of redemption might be taken and sold by the crown under an extent. (The King *v.* De la Motte, For. 162.)

(*d*) Forth *v.* Duke of Norfolk, 4 Mad. 503.

was bound from the time of signing the judgment, such trust property only as the trustee was possessed of at the time of the execution sued was affected; and if he conveyed before execution the land could not be taken (*e*).

135. By the statute 1 & 2 Vict. c. 110 (*f*) (**874**,) judgment creditors, whose rights under the former law were limited to a moiety of particular descriptions only of the debtor's property, and who had only a general charge upon such property, acquire a specific charge upon all such lands, tenements, rectories, advowsons, tithes, rents and hereditaments, including copyhold or customary lands, of or to which the person against whom judgment is entered up shall at the time of the entering up thereof, or at any time after, be seised, possessed or entitled for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up the judgment, or at any time after, have any absolute disposing power; and the judgment is made binding against the judgment debtor, and all persons claiming under him after such judgment, and the issue of his body, and all persons whom he is absolutely entitled to bar. But no judgment creditor shall be entitled to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the entering up of his judgment (**878**). And no preference shall be gained in respect of a judgment charge, in case of the bankruptcy of the judgment debtor, unless the judgment shall have been entered up at least a year before the bankruptcy (**626**).

This period of one year is only applicable (*g*) to the entering up, and not to the registration of the judgment, so that a charge may be enforced after the lapse of a year from the entering up, although the judgment may have been registered since that period (**174**).

136. The operation of judgments against purchasers and mortgagees has however been restricted by several more recent statutes. The first of these, the object of which was to avoid

(*e*) Harris *v.* Pugh, 4 Bing. 335; 12 Mo. 577.

(*f*) Sect. 13.

(*g*) Derbyshire and Staffordshire Rail. Co. *v.* Bainbrigge, 15 Beav. 146; and see Ex parte Boyle, 17 Jur. 979.

the delay and expense in consequence of judgments against mortgagees and crown debts, and liabilities to the crown of mortgagees, continuing to bind lands, although the mortgagees had been bonâ fide paid off, and the lands conveyed to purchasers or other mortgagees, provided (*h*), that where any legal or equitable estate or interest, or any disposing power in or over any lands, tenements or hereditaments, shall, under any conveyance or other instrument executed after the passing of the act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments shall not be taken in execution under any elegit or other writ of execution upon any judgment, decree, order or rule against any mortgagee or mortgagees thereof who shall have been paid off prior to or at the time of the execution of such conveyance; nor shall any such judgment, &c., or the money thereby secured, be a charge upon such lands, tenements or hereditaments so vested in purchasers or mortgagees, nor shall such lands, &c., so vested be extended or taken in execution, or rendered liable by or on behalf of the crown in respect of any liability by any mortgagee or mortgagees, whereby he or they hath or have or shall become a debtor or accountant or debtors or accountants to the crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid. The purchaser, therefore, of property subject to a mortgage, which is intended to be paid off out of the purchase-money, cannot object to complete on the ground that judgments or crown debts are entered up against the mortgagee (*i*).

137. By another statute (*j*), which recites that it is desirable to place freehold, copyhold and customary estates on the same footing with leasehold estates, in respect of judgments, statutes and recognizances, as against purchasers and mortgagees (but which does not appear otherwise to affect the operation of judgments), and also to enable purchasers and mortgagees of estates to ascertain when execution has issued on any judgment,

(*h*) 18 & 19 Vict. c. 15, s. 11.
(*i*) Greaves *v.* Wilson, 25 Beav. 434; 4 Jur., N. S. 802.
(*j*) 23 & 24 Vict. c. 38, s. 1.

statute or recognizance, and to protect them against delay in the execution of the writ, it is enacted that no judgment, statute or recognizance (the word judgment being declared (*k*) to include registered decrees, orders of courts of equity and bankruptcy and other orders having the operation of a judgment (**162**)), to be entered up after the passing of the act (23 July, 1860), shall affect any land of whatever tenure as to a bonâ fide purchaser for valuable consideration, or a mortgagee, whether with or without notice of any such judgment, statute or recognizance, unless a writ or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as thereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: Provided that no judgment, statute or recognizance to be entered up after the passing of the act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a bonâ fide purchaser or mortgagee, although execution or other process shall have issued thereon and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

138. And by a yet later statute (*l*), which recites that it is desirable to assimilate the law affecting freehold, copyhold and leasehold estates to that which affects pure personal estates, in respect of future judgments, statutes and recognizances, it is declared, that no judgment (which also includes (*m*) registered decrees, orders of courts of equity and bankruptcy and other orders having the operation of a judgment), statute or recognizance, to be entered up after the passing of the act (29th July, 1864), shall affect any land (including corporeal

(*k*) Sect. 5. Neither in this nor in the statute next cited is there any definition of a recognizance. But as the recognizance mentioned in the statutes must have been registered under the judgment acts, it seems clear that the common law recognizance (**141**) only is intended, and not that which, upon various occasions, is entered into by persons who give security to the Court of Chancery, and which it is understood are never registered, though they are enrolled according to the practice of that court. (See Lord Bacon's Orders, 16 Jac. 1, No. 92; XLII. Cons. Ord. V.)

(*l*) 27 & 28 Vict. c. 112, s. 1.

(*m*) Sect. 2.

or incorporeal hereditaments, or any interest therein) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance.

139. There seems reason to think that the effect of the attempt here made to "assimilate" the law has been to give a greater effect to the execution than it has against personal estate; for by the interpretation clause of this act the word "debtor" is made to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons, whose estate or interest in the lands affected by the judgment appear therefore to be subjected to the execution; on the other hand, the execution will not under this act have the effect upon such real estate, as the debtor had power to appoint for his own benefit, which was given to a judgment by 1 & 2 Vict. c. 110, nor upon such as the debtor has alienated before execution by a voluntary conveyance (*n*).

140. Under the act of 23 & 24 Vict. c. 38, a judgment will not be a charge upon the land unless the judgment creditor have issued execution, although where the interest of the judgment debtor is only equitable, the execution will be of no avail (*o*). But where the judgment creditor has issued execution he will be protected, even under 27 & 28 Vict. c. 112, although he cannot literally comply with the requirement of the act, that the land shall have been delivered in execution (*p*).

Of Voluntary Judgments.

141. By 1 & 2 Vict. c. 110, several additions were made to the provisions already in force concerning those voluntary judgments (*q*), which have been already referred to (**6**), and

(*n*) See 11 Jur., N. S., pt. 2, 429.

(*o*) Wallis *v.* Morris, 10 Jur., N. S. 741.

(*p*) Thornton *v.* Finch, 4 Gif. 515.

(*q*) Besides the recognizance at common law, which was an obligation acknowledged by the purchaser in a court of record or before a judge, master in chancery or justice of the peace, and upon which execution might be sued out as on a judgment actually recovered in a suit, it will be proper to mention here several other forms of security, in the nature of voluntary judgments,

which are entered up under a warrant of attorney to confess judgment in a future action or under a cognovit actionem,

which have now fallen into disuse. The first, called the *statute merchant*, was provided by the Statute of Acton Burnell (11 Edw. 1), and was regulated by 13 Edw. 1, st. 3, c. 1. It was an acknowledgment by the debtor of a merchant of the debt and the day of payment before the mayor of London or chief warden of a city or town or other persons appointed by the king, and evidenced by a recognizance enrolled with an obligation sealed with the seals of the debtor and of the king, and enforceable, in the case of non-payment, by imprisonment of the body of the debtor, if he were lay, by such mayor or warden, if he were within their jurisdiction, and if not, then by writ out of Chancery directed to the sheriff. During the first quarter of a year of his imprisonment the debtor had the opportunity of paying the debt out of his own goods and chattels, which were delivered to him for that purpose; if he refused, his lands and goods were delivered to the merchant by a reasonable extent till the debt should be levied, the debtor meanwhile remaining in prison. If the debtor could not be found, or were a clerk, the merchant had delivery of all his goods and lands and a writ to take his body, if he were lay, with liberty to the debtor to sell the property after delivery to the merchant, so that he had no damage, and allowing his costs and expenses. If the debtor or his sureties died, the land might be taken, but not the body of the heir.

The statute staple, founded upon 27 Edw. 3, st. 2, was a recognizance acknowledged before the mayor and one of the two constables and sealed with the seal of the staple, by virtue of which the mayor might take the body of the debtor and commit him to prison, if found within the staple, till he made agreement for the debt and damages, and might seize and deliver to the creditor or sell the goods of the debtor within the staple; and if the debtor, or goods to the amount of the debt, were not within the staple, execution might issue out of Chancery against the body, lands and goods of the debtor, as in the case of a statute merchant.

There was also, under 23 Hen. 8, c. 6, a recognizance, *in the nature of a statute staple*, sometimes called a *statute staple improper* (Cowell), by which the like remedies as might be had upon an ordinary statute staple were given to ordinary creditors, the bond or recognizance being acknowledged before the chief justice of the King's Bench or Common Pleas, and in their absence out of term before the mayor of the staple of Westminster and the recorder of London jointly; the recognizance being sealed with the seal of the debtor of the king and of the judge or person before whom it was taken. Statutes merchant and statutes staple were directed to be inrolled by 27 Eliz. c. 4, ss. 7, 8; 29 Car. 2, c. 3, s. 18 (Statute of Frauds), and 8 Geo. 1, c. 25.

The statute merchant and statute staple were designed for the benefit of merchants, and to render unnecessary the arbitrary remedies by way of reprisal by which the amount of debts were then exacted from the countrymen of foreign debtors, or out of their goods. The process may be illustrated by the ancient custom of an English borough, by which if a foreigner became indebted to a townsman, who made oath thereof before the bailiffs, they "directed letters" to the magistrates of the place where the debtor resided, requiring payment, and on default, after three months, a second letter, requiring judgment on the goods, and if insufficient, on the body of the defaulter: failing these applications, the bailiffs were to award an attachment against the next ship from that place or any

which is an acknowledgment of a demand, for the recovery of which a suit has actually been commenced.

142. The adverse character which is imputed to judgments so obtained is productive of important consequences, where restrictions are imposed upon the alienation of property (**393, 398, 881**); for if the warrant of attorney be *bonâ fide* given as security for or to stave off proceedings for the recovery of a debt, and be not part of a contrivance to effect a covert alienation of the property contrary to the restriction, it creates no forfeiture of a lease which contains a covenant against assignment, with a proviso for re-entry on breach; or even a covenant not to charge or incumber, by mortgaging or granting any rent-charge or other incumbrance; or which forbids any assignment, mortgage or other mode of anticipation, or any act by which the income would become payable to any other person or persons than the devisee (*r*). But if the covert intention be shown, the form of security will be no protection against forfeiture.

goods of any inhabitant of that place coming within the liberties of the borough. (Documents relating to the Borough of Great Yarmouth, 1855; and see Hallam's Europe during the Middle Ages, vol. 2, p. 398). Remedies of this kind were however not used only against foreigners. By a "Charter of Debtor and Creditor," King Henry III. ordained that neither the property nor the person of a burgess of Yarmouth should be arrested in any part of the king's dominions for a debt of which he was not the principal or the surety, except the person on whose account he was arrested were also a burgess, and were able to discharge the debt entirely or in part; and except also the burgess arrested had been instrumental in preventing the debtor from doing justice to his creditors.

Other traces of this mode of obtaining payment of debts still remain, and at the present day, by the custom of the city of London, if a plaintiff sue a defendant in the lord mayor's court ineffectually, and a third person indebted to the defendant be found within the jurisdiction, a debt due from such third person by the defendant may be attached after warning to him by the plaintiff, who may enforce payment thereof by execution. It has been attempted to extend this custom to a case in which the cause of action in the original suit did not arise within the city, but in this respect it was declared to be void. (See Cox *v.* The Lord Mayor of London, 1 H. & C. 338; 2 Id. 401; 8 Jur., N. S. 542; 32 L. J., N. S. Exch. 64; H. of L., 2 W. N. 235.) A like custom is said to exist in Bristol, Exeter and Lancaster (see Pulling's Customs of London, 187), and the principle has been adopted in the garnishee clauses of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 60–65 (**891**).

(*r*) Doe *d.* Mitchinson *v.* Carter, 8 T. R. 57, 300; Croft *v.* Lumley, 2 Jur., N. S. 279; 6 H. L. Ca. 672; Avison *v.* Holmes, 1 Jo. & H. 530; and see cases in note there.

143. The voluntary character of these instruments is however recognized in the case of infants, who are not allowed either to appoint or appear in court by an attorney (but by guardian only), and who cannot state an account or make any agreement in prejudice of their rights (*s*).

144. It had already been enacted (*t*) concerning these securities, that if the holder should think fit, every warrant of attorney to confess judgment in any personal action or a true copy thereof, and of the attestation thereof, and the defeasance and endorsements thereon if such warrant should be given to confess judgment in the King's Bench, or such a true copy thereof in any other court, should within twenty-one days after execution be filed, together with an affidavit of the time of execution, with the clerk of the docquets and judgments in the Court of King's Bench. And (*u*) that if, after the expiration of twenty-one days from the execution, the maker of the warrant should be declared a bankrupt, then unless such warrant or a copy thereof should have been filed as aforesaid within twenty-one days from the execution, or unless judgment should have been signed or execution issued on such warrant within the same period, the judgment and execution should be deemed fraudulent and void against the assignees under the bankruptcy. The like provisions were made as to cognovits (*x*).

Every warrant of attorney and cognovit was also declared void (*y*), if any defeasance or condition, to which it was made subject, were not written upon the same paper or parchment upon which the warrant or cognovit was written, before the filing of the same or a copy thereof.

It was also provided (*z*), that particulars of all warrants of attorney and cognovits in personal actions, which should be filed, should be entered by the officer of the Court of King's Bench in books which should be open to inspection according to the form contained in the schedule to the act. And power

(*s*) Oliver *v.* Woodroffe, 4 M. & W. 650.
(*t*) 3 Geo. 4, c. 39, s. 1.
(*u*) Sect. 2.
(*x*) Sect. 3.
(*y*) Sect. 4.
(*z*) Sect. 5.

is given (*a*) to any of the judges of the court in which the warrant of attorney or cognovit is given, to order a memorandum of satisfaction to be written upon such warrant, cognovit or copy thereof respectively as aforesaid, if it shall appear that the debt for which the warrant or cognovit was given has been satisfied or discharged.

145. The statute of Victoria further declares (*b*), that no warrant of attorney to confess judgment in any personal action or cognovit actionem, given by any person, shall be of any force unless there be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. And (*c*) a warrant of attorney or cognovit not executed in manner aforesaid is not rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

By another act (*d*), an additional book or index is directed to be provided, in which only the names, additions and descriptions of the respective defendants or persons giving the warrants or cognovits are entered, and which may be searched or payment of the additional fee mentioned in the act (*e*).

146. The provisions of the statute 1 & 2 Vict. c. 110, are extensions of certain rules of court made in 15 Car. II. and 4 Geo. II., which required first the presence of an attorney at the execution of a warrant, and later, the presence of an attorney on behalf of a person in custody executing a warrant (*f*). The act applies to warrants of attorney, whether executed in this or in a foreign country (*g*).

(*a*) 3 Geo. 4, c. 39, s. 8.

(*b*) 1 & 2 Vict. c. 110, s. 9.

(*c*) Sect. 10.

(*d*) 6 & 7 Vict. c. 66.

(*e*) Warrants of attorney to confess judgments in Ireland are subjected to nearly the same regulations by 3 & 4 Vict. c. 105, ss. 12—18 inclusive.

(*f*) See Hutson *v.* Hutson, 7 T. R. 7; Walker *v.* Gardner, 4 B. & Ad. 371.

(*g*) Davis *v.* Trevanion, 2 Dowl. & L. 743.

147. A consent to a judge's order for staying proceedings on payment of debt and costs does not require the interposition of an attorney for the debtor, under the statute, because nothing can be done by virtue of such a consent until the judge's order is made, in which respect it differs from a cognovit (*h*). An attorney is also unnecessary in cases of ejectment (*i*), because the statute is expressly confined to personal actions, and where the defendant himself is an attorney (*j*); for then he is in no want of that protection which it was the object of the statute to supply.

148. The attorney whom the statute requires to be present on the part of the defendant must not be the attorney for the plaintiff (*k*); and this rule disqualifies for the office both the London agent of the plaintiff's attorney, if he be acting as the agent of the latter in the business, and also an attorney acting as the clerk of the plaintiff's attorney, though the latter may also have acted for the defendant (*l*); for there is no distinction between principal and agent, either as to the act done, or the duty which attaches to the person who does it. The disqualification is complete, if it can be shown, or inferred from the evidence, that the attorney acted in the matter for both parties; even though it be proved that the debtor chose to confide in him, and refused to employ any other; and the rule was not relaxed where further advances had been made after the execution of the warrant, and the objection was not raised till some time had elapsed after judgment was signed and execution levied (*m*).

Further, the debtor's attorney must be "expressly named by him," by which however it is not meant that every attorney named or suggested by another person, or even by the plaintiff himself or his attorney, is necessarily excluded. Such a nomination is indeed a reason for a more jealous scrutiny of

(*h*) Thorne *v.* Neale, 2 Q. B. 726; Bray *v.* Manson, 8 M. & W. 668.

(*i*) Doe *d.* Kingston *v.* Kingston, 1 Dowl. P. C., N. S. 263.

(*j*) Chipp *v.* Harris, 5 M. & W. 430.

(*k*) Mason *v.* Kiddle, 5 M. & W. 513.

(*l*) Pryor *v.* Swaine, 2 Dowl. & L. 37; Durrant *v.* Blurton, 9 Dowl. P. C. 1015.

(*m*) Cooper *v.* Grant, 12 C. B. 154; Rising *v.* Dolphin, 8 Dowl. P. C. 309; Sanderson *v.* Westley, id. 412; Hirst *v.* Hannah, 17 Q. B. 383.

the transaction, but the object of the statute is obtained if it be shown that the debtor exercised a free, if not an original, choice in the matter. So long as the attorney is bonâ fide appointed by the debtor himself, it matters not by whom he was introduced, or that he was previously a stranger to the debtor, or even that he was paid by the creditor (*n*).

The attorney is to attend at the debtor's request, to inform him of the nature and effect of the warrant or cognovit before execution. The attorney is only bound to do this if he be required by the debtor, and is not bound to read the instrument to him unless he desires it. Nor can the debtor complain that proper advice was not given him, either by the attorney's neglect, or in consequence of his own omission to give the attorney proper explanations (*o*).

149. The requirements as to attestation are threefold; comprising subscription by the attorney as a witness, a declaration that he is attorney for the person who executes, and subscription as such attorney. The attestation, though not necessarily in the words of the statute, must show by necessary implication that all these requisites have been fulfilled (*p*). And this has been particularly insisted upon with respect to the last, in connection with the second part of the clause. The attorney may have explained the instrument to the debtor, without acting as his attorney in doing so; for he may have done it without the debtor's request, or before being employed as his attorney. And he may subscribe the instrument, yet not as the debtor's attorney, because though previously so named, and acting, his employment may cease before the attestation (*q*). It is not necessary for the attorney to state in the subscription that he is expressly named by the debtor, or that he attended at his request (*r*).

(*n*) Haigh *v.* Frost, 7 Dowl. P. C. 743; Taylor *v.* Nicholls, 6 M. & W. 91; Joel *v.* Dicker, 5 Dowl. & L. 1; Hale *v.* Dale, 8 Dowl. P. C. 599; Pease *v.* Wells, id. 626; Barnes *v.* Pendrey, 7 Dowl. P. C. 747; Bligh *v.* Brewer, 3 Dowl. P. C. 266; see Rice *v.* Linsted, 7 Dowl. P. C. 153.

(*o*) Haigh *v.* Frost, 7 Dowl. P. C. 743; Taylor *v.* Nicholls, 6 M. & W. 91; Joel *v.* Dicker, 5 Dowl. & L. 1.

(*p*) Pocock *v.* Pickering, 18 Q. B. 789; Holt *v.* Kershaw, 5 D. & L. 422.

(*q*) Hibbert *v.* Barton, 10 M. & W. 678; Oliver *v.* Woodroffe, 4 M. & W. 650; Everard *v.* Poppleton, 5 Q. B. 181; Poole *v.* Hobbs, 8 Dowl. P. C. 113; Potter *v.* Nicholson, 8 M. & W. 294.

(*r*) Gay *v.* Hall, 5 D. & L. 422.

150. The defendant himself, though bankrupt, or an outlaw, may dispute on the ground of undue execution, the validity of a warrant of attorney, or of a judgment which has issued thereon; but a third person, unless, like an assignee in bankruptcy, he stand in the debtor's place, cannot do so (*s*). The authority of an attorney, who acts on such an application for an absent debtor, must be proved (*t*).

151. The Bankrupt Act of 1849 also provides (*u*), that every warrant of attorney to confess judgment in any personal action given by any bankrupt within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every cognovit or consent to a judge's order for judgment given by any bankrupt within two months of the filing of such petition in any action commenced by collusion with the bankrupt, and not adversely, or purporting to have been given in an action, but having in fact been given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, cognovit or consent, shall be void, whether given in contemplation of the bankruptcy or not.

152. Any warrant of attorney to confess judgment in any personal action, or any cognovit in any personal action given by any trader, and which, or a true copy thereof, shall not have been filed in the Court of Queen's Bench within twenty-one days next after the execution thereof according to 3 Geo. 4, c. 39, is to be deemed fraudulent and void. It will also be void if any defeasance or condition to which it shall be subject be not written on the same paper or parchment with the warrant or cognovit before the time when the same or a copy thereof shall be filed (*x*).

153. Every judge's order made by consent by any such trader defendant in any personal action, and whereby the

(*s*) Taylor *v.* Nicholls, 6 M. & W. 91; Davis *v.* Trevanion, 2 Dowl. & L. 743; Chipp *v.* Harris, 5 M. & W. 430.

(*t*) Lewis *v.* Lord Tankerville, 11 M. & W. 109.

(*u*) 12 & 13 Vict. c. 106, s. 135.

(*x*) Sect. 136.

plaintiff shall be authorized then or thereafter to sign or enter up judgment, or to issue and take out execution, and whether such order shall be subject to any defeasance or condition or not, and every judgment so entered up, and execution issued thereon, shall be void, unless, whether the action be in the Court of Queen's Bench or in any other court, a true copy of the order, with an affidavit of the time at which such consent was given, and a description of the residence and occupation of the defendant, be filed in the Court of Queen's Bench within twenty-one days after the making of such order (*y*).

Of Charging Orders.

154. An order may be obtained by any judgment creditor, charging all the interest of the judgment debtor whether in possession, remainder or reversion, and whether vested or contingent, in government or other stock, funds or annuities, or stock or shares in any public company in England, incorporated or otherwise, and whether standing in the name of or in trust for the judgment debtor, and including such property when standing in the name of the Accountant-General of the Court of Chancery, and the interest, dividends and annual produce thereof. But as to such property when standing in the name of the Accountant-General, no such order is to prevent the Bank of England, or any public company, from permitting the transfer of or paying the same respectively in such manner as the Court of Chancery shall direct, or shall have any greater effect than if the judgment debtor had charged the property in favour of the creditor, with the amount mentioned in any such order. The order entitles the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; but no proceedings may be taken to obtain the benefit of the charge till the expiration of six calendar months from the date of the charging order (*z*) (**716**).

The effect of the order is to create an immediate charge (*a*).

(*y*) 12 & 13 Vict. c. 106, s. 137.
(*z*) 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1.
(*a*) Montefiore *v.* Behrens, L. R., 1 Eq. 171.

155. The property to be charged must be standing in the name of or in trust for the judgment debtor (*b*); it is not sufficient that he has merely a beneficial interest in it. And by the expression "public company" is to be understood (*c*) a company which has the attributes of publicity, by virtue of an obligation to return to public officers the names and places of abode of its members and of the officers appointed to sue and be sued on its behalf, whether the capital be divided into shares or not.

156. As the charging order may affect funds which are not the subject of litigation, it need not be entitled in any cause or matter (*d*), but only in the acts 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82. It is made in the first instance ex parte without notice to the judgment debtor, and is only to show cause why the property should not be charged, and it may properly fix a certain and reasonable period at which cause is to be shown (*e*). But it must not be conditional in form (*f*). In the case of government stocks, funds, or annuities, or shares in public companies standing in the name of the judgment debtor "in his own right" (which words do not exclude (*g*) property which has been equitably mortgaged if it be still standing in the name of the debtor), or in trust for the debtor, the order restrains the Bank of England or public company from permitting a transfer till the order is made payable or is discharged; and any person or corporation permitting a transfer after notice becomes liable to the judgment creditor, against whom no disposition by the debtor in the meantime is effectual. The order will be made absolute after proof of notice thereof to the judgment debtor, his attorney or agent, and unless the judgment debtor shall, within a time to be mentioned in the order, show to a judge of one of the superior courts sufficient cause to the contrary. A charging order may be made absolute, although costs have been incurred by the trustees in whose

(*b*) Taylor *v.* Turnbull, 33 L. T., Ex. 153. A pension is therefore not within the act. (Morris *v.* Manesty, 7 Q. B. 674.)

(*c*) M'Intyre *v.* Connell, 15 Jur. 529; 1 Sim., N. S. 225; see Graham *v.* Connell, 19 L. J., Ex. 361.

(*d*) Lord Hastings *v.* Bevan, 10 W. R. 206.

(*e*) Robinson *v.* Burbidge, 9 C. B. 289.

(*f*) Gibbs *v.* Flight, 13 C. B. 803.

(*g*) Fuller *v.* Earle, 7 Exch. 796.

name, the fund is standing and who have no other fund for repayment of them, because the order does not affect the right of the Court of Chancery to give directions as to the transfer or payment (*h*) (**154**).

Power is reserved to the judge to discharge or vary the order, on the application of the debtor or any person interested (*i*).

157. A charging order under 1 & 2 Vict. can in general only be made by a single common law judge, the full court of law having no original jurisdiction under the act for that purpose, though in a proper case it will set aside the rule after it has been made absolute (*k*). A judge of the Court of Chancery can only make a charging order where the subject of the security is a fund chargeable under a decree of that court (*l*), and not where there is a judgment at law; but it may be made by any equity judge, though the suit or matter in which the decree or order was made be not attached to his court (*m*).

Under the corresponding section (s. 23) of the Irish statute, the power of making a charging order is expressly given to the Court of Chancery as well as to the superior courts of common law or a judge thereof.

158. Where the fund affected by the charging order is in the Court of Chancery, a stop order must be obtained. No order will be made on petition for payment of the fund to the creditor without the consent of the owner of it, even though he do not appear on the petition (*n*). Where the judgment at law in respect of which the charging order is to be obtained, is given by the direction of, and is to be dealt with by the Court of Chancery, the leave of that court is necessary (*o*)

(*h*) Smith *v.* Youde, 2 Fost. & Fin. 376.

(*i*) 1 & 2 Vict. c. 110, s. 15; corresponding Irish act, 3 & 4 Vict. c. 105, s. 24.

(*k*) Brown *v.* Bamford, 9 M. & W. 42; and see Witham *v.* Lynch, 1 Exch. 391.

(*l*) Miles *v.* Presland, 2 Beav. 300; 4 M. & C. 431; and for form of order see Stanley *v.* Bond, 7 Beav. 386; and see 8 id. 50; Westby *v.* Westby, 5 De G. & S. 516; Wells *v.* Gibbs, 22 Beav. 204.

(*m*) Lord Hastings *v.* Beavan, 10 W. R. 206.

(*n*) In re Nowell, 9 Jur., N. S. 788; Whitfield *v.* Prickett, 13 Sim. 259; see Courtoy *v.* Vincent, 15 Beav. 486.

(*o*) Spence *v.* Briscoe, 26 Beav. 599.

before applying for the charging order. And under the Irish act, in the case of a chancery fund, the convenient course is to apply to that court in the first instance. But if the creditor choose to obtain the order from a Court of Law, then to avoid a clashing of jurisdictions, he must (*p*) apply to the Court of Chancery for liberty for the accountant-general to act under the order, which that officer has otherwise no right to do.

Though a charging order made in terms applicable to the whole fund will be bad so far as relates to the interest of a person who has already established a lien upon it, the order will yet extend to whatever interest the debtor had when it was obtained, and a stop order will be made on the foundation of such a charging order, excepting the interests of the prior incumbrancers (*q*).

The grant of a stop order does not decide the rights of any of the parties, but merely prevents payment or transfer out of court, without notice to the claimant, who is thus enabled to appear and support his rights (*r*). It will be granted only on admission or proof of title, and not (even by consent) without prejudice to the validity of the incumbrance (*s*). It operates only as to the particular charges in respect of which it was obtained (*t*).

159. A stop order will be granted against a cheque drawn by the accountant-general in favour of the judgment debtor, if the cheque have not been delivered out; but the court will not generally give leave to the sheriff to seize it in the hands of the accountant-general, not considering, under such circumstances, that it is the property of the debtor (*u*). Where, however, a cheque was delivered out under a power of attorney from the judgment debtor, under circumstances which induced the person to whom it was delivered to return the cheque to the Accountant-General's Office, the sheriff had leave to seize it there, because, though lying in the office of the accountant-general, it was not considered to be in his posses-

(*p*) Gore *v.* Gore, 4 Ir. Eq. R. 164.

(*q*) Hulkes *v.* Day, 10 Sim. 41; Robinson *v.* Wood, 5 Beav. 388.

(*r*) Lucas *v.* Peacock, 9 Beav. 181.

(*s*) Winchelsea *v.* Garraty, 1 Beav. 223.

(*t*) Macleod *v.* Buchanan, 33 Beav. 234; 9 Jur., N. S. 1266; 10 id. 223.

(*u*) Courtoy *v.* Vincent, 15 Beav. 486.

sion, but to be the property of the judgment debtor, as if it had not been returned (*x*).

A stop order may also be granted against deeds deposited in court (*y*), but such an order was refused (*z*) to a mortgagee of the reversion of an estate, when the deeds had been brought in by the owner of the particular estate under a decree and merely for the purposes of the suit.

160. In applying for a stop-order, it is not necessary to serve the petition or summons upon the parties to the cause, or upon the persons interested in such parts of the stock or property as are not sought to be affected, but the person who obtains the order or the shares of such stock or other property shall be liable, at the discretion of the court or the judge at chambers, to pay any costs, charges and expenses which by reason of any such order having been obtained shall be occasioned to any party to the cause or matter, or any person interested in such stock or other property (*a*)

Notwithstanding this order, the assignor of the fund must be served with the petition or summons, and the assignment must be proved or admitted. It must also be shown that he has an interest in the fund, though it is not necessary to prove his title to any particular share of it (*b*).

161. The courts of law will not rescind a charging order made by a judge, by reason of a doubt whether the property assumed to be charged is within the act, or whether the debtor has any interest in it; because (*c*), there being no appeal from a decision on such a proceeding, the rights of the parties cannot be finally determined. The order in such a case will be confirmed valeat quantum, and the parties left to obtain a decision as to its effect from the Court of Chancery. Nor

(*x*) Watts *v.* Jefferyes, 3 Mac. & G. 422.

(*y*) Williamson *v.* Symonds, 9 Beav. 523.

(*z*) Cotton *v.* Cotton, 6 Beav. 96.

(*a*) XXVI. Cons. Ord. (3 Apl. 1841).

(*b*) Wood *v.* Vincent, 4 Beav. 419; Parsons *v.* Groome, id. 521; Quarman *v.* Williams, 5 id. 133.

(*c*) Nichols *v.* Rosewarne, 6 C. B., N. S. 480; 5 Jur., N. S. 1266; Baker *v.* Tynte, 6 Jur., N. S. 1192; Witham *v.* Lynch, 1 Exch. 391. It appears to be otherwise where the Court is satisfied that the property is not within the act. (Morris *v.* Manesty, 7 Q. B. 674.)

will a court of law interfere respecting an order, the validity of which depends upon a question of equity (*d*). If stock to be charged, be standing in the name of a trustee, upon trust for a debtor, who has partly a beneficial, and partly a fiduciary interest in the dividends, the order will charge (*e*) so much only of the dividends as is payable to the debtor for his own use and benefit; thus leaving the distribution of the fund to the discretion of the trustees, and if necessary to the order of the Court of Chancery.

Of Decrees and Orders for Payment of Money.

162. All decrees or orders of Courts of Equity, rules of Courts of Common Law or orders of a superior jurisdiction in bankruptcy, and of the Lord Chancellor (and Lords Justices) in lunacy, whereby any sum of money or any costs, charges or expenses shall be payable to any person, have the effect of judgments in Superior Courts of Common Law; and the persons to whom such monies are payable are judgment creditors within the meaning of the act, and have the same remedies as are given to judgment creditors; and the powers given by the act to the judges of the Superior Courts of Common Law, with respect to matters depending therein, may be exercised by Courts of Equity with respect to matters therein depending and by the judges in bankruptcy, and the Lord Chancellor (and Lords Justices) in lunacy (*f*) (**174**).

The like effect is given to decrees and orders of the High Court of Admiralty, which is made a Court of Record (*g*); but the enactment of 1 & 2 Vict. c. 110, does not apply to

(*d*) Rogers *v.* Holloway, 5 Man. & G. 292.

(*e*) Fowler *v.* Churchill, 11 M. & W. 57.

(*f*) 1 & 2 Vict. c. 110, s. 18; Irish act, 3 & 4 Vict. c. 105, s. 27; but see 13 & 14 Vict. c. 29, ss. 1, 2, Ir.

(*g*) Admiralty Court Jurisdiction Act, 1861, 24 Vict. c. 10, ss. 14, 15: and all powers of enforcing judgments possessed by the superior courts of common law or any judge thereof, with respect to matters depending in the same courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the Court of Admiralty with respect to matters therein depending; and all remedies possessed by judgment creditors shall be in like manner possessed by persons to whom any monies, costs, charges or expenses are by such orders or decrees of the Court of Admiralty directed to be paid.

orders for payment of money made by the Court of Probate under the Court of Probate Act (*h*). The statute does not make decrees in equity enforceable by the process of a court of law. It is necessary to issue the process out of the court in which the decree was made (*i*). And it has been held, that the Irish act makes no change in the nature of a sequestration issued to enforce obedience to an order of the court, so as to convert it into an execution; the effect of such a proceeding being, as before the act, that the property levied under the sequestration does not belong to the person at whose instance it was obtained, but is applied according to the rights and priorities of the incumbrancers (*k*).

The decree of a Court of Equity to operate as a judgment under this provision must be a final and not an interlocutory decree for the payment of a specific sum of money, or of a sum, the amount of which can be ascertained by the mere computation of interest or taxation of costs (*l*). A mere decree for an account, with a direction to pay what is found due, where a set-off is claimed, being only an order for taking an account under which nothing may become payable to the plaintiff, will not have the effect of a judgment (*m*). A decree for specific performance, with a reference to compute and tax interest and costs, and an order to pay the amount found due with the purchase-money, appears to fall within the rule, being an order to pay a definite sum and a final adjudication; and such a decree has been held for the purposes of priority to constitute a judgment debt (*n*).

An order of the Court of Chancery for payment of a sum of money into court within a limited time is said not to be

(*h*) 20 & 21 Vict. c. 77, s. 25; Pratt *v.* Bull, 4 Gif. 117; 1 De G., J. & S. 141; 9 Jur., N. S. 40, 239. But where a decree made under the Divorce Act, 20 & 21 Vict. c. 85, s. 52, had been registered under 1 & 2 Vict. c. 110, the Court of Common Pleas refused to expunge the registration. (Ex parte Holden, 13 C. B., N. S. 641; 9 Jur., N. S. 948.)

(*i*) Stanford *v.* Robinson, 3 Man. & G. 407; 4 Sc., N. R. 23.

(*k*) Burne *v.* Robinson, 7 Ir. Eq. R. 188.

(*l*) Garner *v.* Briggs, 4 Jur., N. S. 230.

(*m*) Chadwick *v.* Holt, 2 Jur., N. S. 918.

(*n*) Duke of Beaufort *v.* Phillips, 1 De G. & S. 321; but see Chadwick *v.* Holt, 2 Jur., N. S. 918.

within the act (*o*); and property which is sold by a person decreed to pay costs, before the registration of the decree, will not be subject to the payment of such costs, because by sect. 19 the decree has not the force of a judgment until registration (*p*) (**174**).

163. It must appear on the face of the rule or order of court that the specific sum is to be paid in respect of which relief is sought. Execution therefore will not be issued to enforce payment of a sum ordered to be paid by an award, though the agreement under which the award was made had been made a rule of court. The proper mode of enforcing such an order is to call upon the debtor to show cause why he should not pay the specified sum, and upon this rule being made absolute execution will issue for that amount (*q*); but execution issued under an ex parte order for payment will be set aside (*r*). A rule nisi for the payment of a sum awarded will not however always be granted, even though the validity of the award be free from doubt. The proceeding is in the nature of an attachment, and the court will not grant (*s*) a summary remedy which will shut out discussion on the merits, where there is a cross demand, or a reasonable doubt from whom the balance will be ultimately due, or as to the validity of the award, unless the defendant have failed to avail himself in proper time of the objections.

164. The act only applies to those costs, charges and expenses, the obligation to pay which appears on the face of the order or decree, and not to those the title to which is incomplete without some further act of the creditor (*t*). It is not however necessary in the case of costs that an order for payment of the specific sum found due by the taxing master should be obtained.

(*o*) Gibbs *v.* Pike, 8 M. & W. 223.

(*p*) Nortcliffe *v.* Warburton, 8 Jur., N. S. 854; and see 18 & 19 Vict. c. 15, s. 4.

(*q*) Jones *v.* Williams, 11 A. & E. 175; Doe *v.* Amery, 8 M. & W. 565.

(*r*) Rickards *v.* Patterson, 8 M. & W. 313.

(*s*) Doe *v.* Amery, 8 M. & W. 565; Dickenson *v.* Allsop, 13 id. 722; Mackenzie *v.* Sligo and Shannon Rail. Co., 9 C. B. 250; Lambe *v.* Jones, 9 C. B., N. S. 478.

(*t*) Jones *v.* Williams, 8 M. & W. 349.

A judge's order under the act 7 & 8 Vict. c. 73, s. 43, ordering judgment to be entered up for the taxed amount of an attorney's bill, has the same effect as a rule of court for payment of money under sect. 18 of the Judgment Act (1 & 2 Vict. c. 110), and the costs of an action brought to recover the taxed costs will be disallowed (*u*).

165. An order in lunacy directing taxation of costs, with an inquiry if it would be proper to raise them by sale or mortgage of the real estate, does not make the costs a judgment debt or a charge in equity on the real estate, though it seems it would be otherwise if the costs were directed to be paid (*w*). Nor does the allocatur of the master of a court of common law (*x*), nor it seems the certificate of the chief clerk of a judge in Chancery (*y*), constitute an order for payment of money within sect. 18. The right of the creditor under an order for payment of costs dates (*z*) from the first registration of the certificate of taxation in the office of the Senior Master of the Court of Common Pleas.

The statute applies to a judgment entered up on a contingent debt, though where the property charged was an annuity, the payments of the annuity which accrued before the judgment debt became actually due were held not to be affected thereby (*a*).

166. Orders for the payment of money are within the act only (*b*) when the money is directed to be paid to the creditor himself, and not when it is to be paid for his benefit merely; and because the statute always contemplates payment to some person, no decree can be registered effectually as a judgment which orders money to be paid into court. This difficulty will be avoided by ordering, when it can be done with safety, the payment to be made to the plaintiff upon his undertaking to pay the money into court, or in the case of a tenant for life

(*u*) Griffiths *v.* Hughes, 16 M. & W. 809.

(*w*) Stedman *v.* Hart, Kay, 607.

(*x*) Shaw *v.* Neale, 20 Beav. 174; 6 H. L. Ca. 581.

(*y*) Mansfield *v.* Ogle, 5 Jur., N. S. 419; 4 De G. & J. 38.

(*z*) Hargrave *v.* Hargrave, 23 Beav. 484.

(*a*) Younghusband *v.* Gisborne, 1 De G. & S. 209.

(*b*) Crowther *v.* Crowther, 2 Jur., N. S. 274.

by directing payment to the person entitled in remainder, upon trust during the life interest (*c*).

167. The provisions of the act of 1 & 2 Vict. c. 110, which were applicable to the Courts of Common Law at Westminster, and the judgments and proceedings thereof, were extended by sect. 21 of that act to the Court of Common Pleas of the Palatine of Lancaster and to the Court of Pleas of the Palatine of Durham, within their respective limits of jurisdiction; the judgments of each having, under certain regulations, the effect of judgments of the Superior Courts at Westminster. And by the act of 1855, s. 2, the provisions of 1 & 2 Vict. c. 110, ss. 18, 19, 20, have been extended to the Courts of Common Law of the counties Palatine and the Chancery of the County Palatine of Durham, registration being also required there.

168. In all cases (*d*) where final judgment shall be obtained in any action or suit in any inferior court of record, in which, at the time of passing the act, a barrister of not less than seven years standing should act as judge, assessor or assistant in the trial of causes, and in all cases where any rule or order shall be made by any inferior court of record as aforesaid, whereby any sum of money, costs, charges or expenses shall be payable to any person, the judges of any of the superior courts of record at Westminster, or, if the inferior court be within the County Palatine of Lancaster, the judges of the Court of Common Pleas at Lancaster, or any judge of any of the said courts at Chambers, are authorized, either in term or vacation, upon the application of any person who shall recover such judgment, or to whom any money, costs, charges or expenses shall be payable by such rule or order, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, the same being respectively under the seal of the inferior court and the signature of the proper officer thereof, to order the judgment, rule or order of

(*c*) Wand *v.* Docker, 5 Jur., N. S. 1287; Ward *v.* Shakshaft, 2 L. T., N. S. 203; Gibbs *v.* Pike, 8 M. & W. 223.

(*d*) 1 & 2 Vict. c. 110, s. 22. Corresponding Irish act, 3 & 4 Vict. c. 105, s. 30.

such inferior court to be removed into such superior court, or Court of Common Pleas at Lancaster, as the case may be; and immediately thereupon such judgment, rule or order shall be of the same force and effect as a judgment recovered in, or a rule or order made by, such superior court; and all proceedings may immediately be taken thereupon, or by reason or in consequence thereof, as if such judgment, rule or order had been originally recovered in or made by the superior court, or the Court of Common Pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered as if the same were part of such judgment, rule or order.

But by the act of 1855 (*e*), no such judgment, which had been or thereafter should be so removed, was to bind any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless after such removal it were registered, and if necessary re-registered, as it must have been if it had been originally entered up in one of the superior courts, or in the Court of Common Pleas at Lancaster, as the case might be. But after the passing of the act every such judgment, rule or order, so registered or re-registered, was made as binding as other judgments, rules or orders of the superior courts or of the Court of Common Pleas at Lancaster. By the same section, a proviso in 1 & 2 Vict. c. 110, s. 22, that no such judgment, rule or order when removed should affect any hereditaments as to purchasers, mortgagees or creditors, further than the same would have done if it had remained a judgment, rule or order of the inferior court, unless and until a writ of execution thereon should be actually put into the hands of the sheriff or other officer appointed to execute the same, was repealed.

169. The superior court will assume that the judgment removed is valid, and will not inquire into the regularity of the proceeding upon which it was founded (*f*). The act does not apply to judgments of county courts established under the modern County Court Act (*g*), the intention of which was to

(*e*) 18 & 19 Vict. c. 15, s. 7.

(*f*) Simons *v.* Count de Wints, 8 Dowl. P. C. 646.

(*g*) See 9 & 10 Vict. c. 95; Moreton *v.* Holt, 10 Exch. 707.

confine the remedies of the creditor to such as were specially given him by that act, though it was otherwise as to the judgments of the old county courts (*h*).

A judgment by the equity side of an inferior court, as of that of the vice-warden of the Stannaries, may also be removed (*i*).

170. The Bankrupt Law Consolidation Act, 1849 (*k*), provides, that if any person examined by the Court of Bankruptcy concerning the affairs of the bankrupt, shall by his examination signed and subscribed, and also by a separate writing in the form directed by the act, and in the presence of his attorney, admit that he is indebted to the bankrupt upon any balance of accounts, the court may order payment of the amount so admitted in full discharge to the official assignee, and also, if it shall think fit, of such costs as are mentioned in the act; and every such order shall have the effect of a judgment of a superior court of common law, and may be enforced accordingly; but shall not affect (*l*) any lands, tenements or hereditaments as against purchasers, mortgagees or creditors, unless and until it be registered, and if necessary re-registered, as it must have been in order to bind such persons, if it had been originally a judgment or rule entered up in one of the superior courts, or in the Palatine Courts of Lancaster or Durham, any notice thereof to any such purchaser, mortgagee or creditor notwithstanding.

171. By the Bankruptcy Act, 1861 (*m*), all costs awarded by any court under the act, are made recoverable in the same manner as costs awarded by a rule of any of the superior courts at Westminster; and the like remedies may be had upon an order of such court for costs as upon a rule of any of the superior courts at Westminster. But no such order shall affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until it shall be registered, and if necessary re-registered, according to 23 & 24 Vict.

(*h*) Williams *v.* Jones, 13 M. & W. 628.

(*i*) Harvey *v.* Gilbard, 7 Dowl. P. C. 616.

(*k*) 12 & 13 Vict. c. 106, s. 123.

(*l*) 18 & 19 Vict. c. 15, s. 10.

(*m*) 24 & 25 Vict. c. 134, s. 213.

c. 38 (181), any notice of any such order to any such purchaser, mortgagee or creditor notwithstanding.

Of the Registration of Judgments.

172. The County Registration Acts (68) provide that no judgment, statute or recognizance, except such as shall be made to the crown, shall bind or affect any lands, tenements or hereditaments within the district but only from the time of the entry at the register office of a memorial containing the particulars mentioned in the several acts (*n*). And several of the acts also provide that, if any judgment, statute or recognizance be registered within thirty days after the acknowledgment or signing thereof, all the lands that the defendant or cognizor had at the time of such acknowledgment or signing shall be bound thereby (*o*).

173. It was provided by several other early statutes (*p*), that judgments should be docketed in the manner and within the periods thereby limited; and it was enacted that no judgments not so docketed should affect purchasers or mortgagees, or have preference against heirs, executors or administrators in the administration of their ancestors,' testators' or intestates' effects.

174. The statute 1 & 2 Vict. c. 110, provides (*q*) that no judgment, decree, order or rule should by virtue of that act affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until (*i. e., from the time only at which*—the words not giving a retrospective validity (*r*)) a memorandum containing the name (*s*) and usual or last place

(*n*) Middlesex act, 7 Anne, c. 20, s. 18; North Riding, 8 Geo. 2, c. 6, ss. 18, 19; West Riding, 5 Anne, c. 18, s. 4; East Riding and Kingston-upon-Hull, 6 Anne, c. 35, s. 19.

(*o*) West Riding act, s. 11; East Riding and Kingston-upon-Hull act, s. 28; North Riding act, s. 33; the period being twenty days. And as to the entry of satisfaction on judgments and recognizances, see the North Riding, West Riding, and East Riding and Kingston-upon-Hull acts.

(*p*) 4 & 5 Will. & M. c. 20; 6 & 7 Will. 3, c. 14; 7 & 8 Will. 3, c. 36. As to requisites of the docket, see Brandling *v.* Plummer, 3 Jur., N. S. 401.

(*q*) Sect. 19. See the Irish act, 3 & 4 Vict. c. 105, s. 28; but see 186.

(*r*) Hargrave *v.* Hargrave, 23 Beav. 484.

(*s*) If the name of the person whose estates are intended to be bound by the judgment be correctly entered in the register, the judgment will bind though in the writ of summons and the title of

of abode, and the title, trade or profession of the judgment debtor and the court and title of the cause or matter in which the judgment, decree, order or rule shall have been obtained or made, and the date thereof and the amount of the debt or monies thereby recovered or ordered to be paid, shall be left with the Senior Master of the Court of Common Pleas, who is to register the same, with the year and day of the month when every such memorandum or minute is left with him (*t*); notwithstanding, as was declared by a subsequent act (*u*), any notice of any such judgment, decree, order or rule to any such purchaser, mortgagee or creditor. But as this protection only extended to judgments, &c., which were binding by virtue of the act 1 & 2 Vict. c. 110, s. 19, that restriction was removed by an act of 1855 (*w*), which provided, that no judgments which *might* be registered under the former act should be effectual against any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless duly registered, notwithstanding notice thereof.

175. Another statute (*x*), by which also the dockets under the act of William and Mary were directed to be closed without prejudice to judgments already docketed, except as they might be affected by the present act, provided (**181**) that no judgment already docketed under the act of William and Mary should affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until the same should be registered under 1 & 2 Vict. And that all judgments of the superior courts, decrees or orders in equity, rules at common law and orders in bankruptcy or lunacy, which had been registered since the passing and under the provisions of the act of 1 & 2 Vict., or which should thereafter be so registered, should be void from the expiration of five years from the date of entry, against lands, tenements and hereditaments, as to purchasers, mortgagees or creditors (**181, 1307**)

the cause in the register book the judgment debtor be misnamed. (Beavan *v.* Lord Oxford, 19 Jur. 154; see Hotham *v.* Somerville, 9 Beav. 63.)

(*t*) 2 & 3 Vict. c. 11, s. 3.

(*u*) 3 & 4 Vict. c. 82, s. 2.

(*w*) 18 & 19 Vict. c. 15, s. 4.

(*x*) 2 & 3 Vict. c. 11, ss. 1, 2, 4. Extended to common law and equity courts of counties palatine by 18 & 19 Vict. c. 15, s. 3; see in Ireland, 13 & 14 Vict. c. 29, ss. 3, 4.

(*i. e.*, all such as derive title through the debtor, and who, but for the statute, would be affected by the judgment (*y*), but such creditors only as are in a position to assert a right against the land, and not simple contract creditors (*z*)), unless in like manner they were re-registered within five years before the execution of the conveyance, mortgage or other instrument vesting or transferring a legal or equitable estate or right in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the creditor's right accrued, and so toties quoties at the end of every succeeding five years. The intention of this act was to make five years' search a complete protection to an intending purchaser, mortgagee or creditor. Under it the registration protects the registered incumbrancer against purchasers, mortgagees or creditors whose incumbrances were acquired during the currency of the first or any subsequent registration; but neither the first nor any subsequent registration will protect against purchasers, mortgagees or creditors whose titles were acquired during the intervals between the first registration, and any re-registration not duly made at the expiration of the five years from the first registration (*a*).

And re-registration is declared by the act of 1855 (*b*) to be sufficient to bind purchasers, mortgagees and creditors if done within the five years before the execution of the conveyance, mortgage, &c., vesting or transferring the legal or equitable right, title, estate or interest in or to any purchaser or mortgagee for valuable consideration, or within five years before the accruer of the creditor's right, though more than five years should have elapsed since the last previous registration before the re-registration, and so toties quoties upon every re-registry.

(*y*) Benham *v.* Keane, 1 J. & H. 685; 7 Jur., N. S. 1096; 3 De G., F. & J. 318.

(*z*) Simpson *v.* Morley, 2 K. & J. 71; distinguishing In re Perrin, 2 Dru. & War. 147, where, on the plain construction of the Irish act, 3 & 4 Vict. c. 105, s. 22, simple contract creditors were held to be referred to.

(*a*) Beavan *v.* Lord Oxford, 6 De G., M. & G. 492; 1 Jur., N. S. 1121; and see Hickson *v.* Collis, 1 Jo. & L. 94; Shaw *v.* Neale, 6 H. L. C. 581; Benham *v.* Keane, 1 J. & H. 685; 3 De G., F. & J. 318; 7 Jur., N. S. 1099; 8 id. 604.

(*b*) 18 & 19 Vict. c. 15, s. 6.

176. The provision of 3 & 4 Vict. c. 82, s. 2, that no purchasers, mortgagees or creditors should be affected by any unregistered judgment, &c., notwithstanding notice thereof, was declared to extend, as well [not only] to the act therein referred to (viz., 1 & 2 Vict. c. 110, and to judgments which bound *by virtue of that act*), as [but also] to the provision in sect. 4 of 2 & 3 Vict. c. 11, which requires re-registration (*c*), as re-registration is explained by the act of 1855. "So that," says the last-mentioned act, "notice of any judgment, decree, order or rule, not duly re-registered, shall not avail against purchasers, mortgagees or creditors as to lands, tenements or hereditaments." The evident intention of this enactment was to put purchasers, mortgagees and creditors on the same footing as to judgments not re-registered, as that upon which they were put by the previous section, with respect to judgments not registered. Now the act (3 & 4 Vict. c. 82, s. 2) which protected against judgments not registered, notwithstanding notice, was confined to judgments affecting property by virtue of 1 & 2 Vict. c. 110; that restriction being removed, as we have seen, by the act of 1855. But in extending the protection against judgments not re-registered, the act of 3 & 4 Vict. has been taken as it stood before it was enlarged by the act of 1855. If, however, the last clause of the 5th section be taken as a positive enactment, no difficulty will arise upon the point.

177. The provisions for the re-registry of judgments, decrees or orders, and rules or orders, contained in 2 & 3 Vict. c. 11, as explained by 18 & 19 Vict. c. 15, have also been declared (*d*) to extend and apply to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as is by 2 & 3 Vict. c. 11, s. 8, required to be registered; so that it is made obligatory on the crown, in order to bind the lands, tenements or hereditaments of its debtors or accountants, as against purchasers, mortgagees or creditors becoming such after the 31st December, 1859, to re-register in like manner as a private person; and

(*c*) Act of 1855, s. 5.

(*d*) 22 & 23 Vict. c. 35, s. 22; not extending to Ireland.

so that notice of any such judgment, &c., not duly re-registered, shall not avail against purchasers, mortgagees or creditors becoming such after that day, as to lands, tenements, or hereditaments. And the provision applies to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as since the passing of 2 & 3 Vict. c. 11, had been, or as should after the passing of the present act be, so registered.

178. It has also been provided (*e*) that no lis pendens (**1158**) shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name, usual or last place of abode, and title, trade or profession of the person whose estate is intended to be affected thereby, and the Court of Equity, title of the cause or information, and the day when the bill or information was filed, shall be left with the Senior Master of the Court of Common Pleas; and the provisions with regard to the re-entering of judgments every five years (*f*) extend to every case of lis pendens registered under the act.

A petition for the judicial winding-up a company under the Companies Act, 1862, constitutes (*g*) a lis pendens within the judgment act of 2 & 3 Vict. c. 11; provided the same be duly registered in the manner required by that act concerning suits in equity. The act only provides for the registration of the petition as a lis pendens against the company, and not against the individual contributories or alleged contributories; and a registration of the latter kind will be ordered to be vacated (*h*).

179. It has also been provided (*i*), that no judgment, statute or recognizance, or obligation or specialty on behalf of the crown, shall affect any lands, tenements or hereditaments, as to purchasers or mortgagees, unless and until a memo-

(*e*) 2 & 3 Vict. c. 11, s. 7. The provision extends to special cases, 13 & 14 Vict. c. 35, s. 17; and was extended to common law and equity courts of counties palatine by 18 & 19 Vict. c. 15, s. 3. See in Ireland 7 & 8 Vict. c. 90; 13 & 14 Vict. c. 29, s. 5.

(*f*) 2 & 3 Vict. c. 11, s. 4.

(*g*) 25 & 26 Vict. c. 89, s. 114.

(*h*) In re Barned's Banking Company, Ex parte Thornton, L. R., 2 Ch. App. 171.

(*i*) 2 & 3 Vict. c. 11, s. 8. See 7 & 8 Vict. c. 90, and 11 & 12 Vict. c. 120, in Ireland.

randum of the name, usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected; and in the case of any judgment, the court, title of the cause, date and amount of the debt, damages and costs; and in the case of a statute or recognizance, the date, the amount of the sum acknowledged, and before whom it was acknowledged; and in the case of an inquisition, the date and the sum found due; and in the case of an obligation or specialty, the date and sum for which the obligee shall be bound, or for which it shall be made; and in the case of acceptance of office, the name of the office and time of acceptance, shall be left for registration with the Senior Master of the Common Pleas for entry in the index to debtors and accountants to the crown, by the name of the person intended to be affected.

180. And the Crown Debts, &c., Act, 1865 (*k*), provides that any judgment, decree or order obtained after the commencement of the act by or on behalf of the crown, or any recognizance entered into after the commencement of the act on the proper account of the crown, or any inquisition finding after the commencement of the act a debt due to the crown on any obligation or specialty to the crown made, or any acceptance of office from or under the crown accepted after the commencement of the act, shall not affect any land of whatever tenure as to a bonâ fide purchaser for valuable consideration, or a mortgagee, whether with or without notice of the judgment, decree or other incumbrance, unless a writ of extent or of *diem clausit extremum*, or other writ or process of execution in pursuance of or in relation to such judgment, decree or other incumbrance, has been issued and registered before the execution of the conveyance or mortgage to such purchaser or mortgagee, and the payment by him of the purchase or mortgage money. This act makes no provision for re-registration.

181. Another statute supplies an omission in the act of 2 & 3 Vict. c. 11 (**175**), by which the old dockets were directed to be closed. At common law an executor or admi-

(*k*) 28 & 29 Vict. c. 104, s. 48. As to the mode of registration, see s. 49.

nistrator was bound to take notice, though he might really be ignorant of a judgment debt, and the payment in preference of a debt by simple contract was a devastavit. But the act of William and Mary provided not only that undocketed judgments should not affect lands or tenements as to purchasers or mortgagees, but further, that they should have no preference against heirs, executors or administrators in their administration of their ancestors,' testators' or intestates' estates. When the dockets provided by that act were abolished, it was only provided that unregistered judgments should not affect lands, tenements or hereditaments as to purchasers, mortgagees or creditors; and by the abolition of the dockets, the statutory protection given to heirs, executors and administrators was at an end (*l*). Hence it has been enacted (*m*), that no judgment which had not already been, or should not thereafter be, entered or docketed under the several acts then in force, and which passed subsequently to the act of William and Mary, so as to bind lands, tenements or hereditaments as against purchasers, mortgagees or creditors, should have any preference against heirs, executors or administrators in their administration of their ancestors,' testators' or intestates' effects. It is not, however, necessary for the purpose of such preference (*n*), that judgments obtained against executors or administrators should be registered, inasmuch as they must know of the existence of such judgments (*o*).

The act also provides, that no judgment which, since the passing of the 1 & 2 Vict. c. 110, had been registered under the provisions therein contained, or contained in the act of 2 & 3 Vict. c. 11, as explained and amended by the act of 18 & 19 Vict. c. 15, or which should thereafter be so registered, should have any preference as against heirs, executors or administrators, in their administration of their ancestors,' testators' or intestates' estates, unless, at the death of the testator or intestate, five years should not have elapsed from

(*l*) See Fuller *v.* Redman, 26 Beav. 600.

(*m*) 23 & 24 Vict. c. 38, s. 3. The act is not retrospective. (Evans *v.* Williams, 2 Dr. & Sm. 324; 11 Jur., N. S. 256).

(*n*) Sect. 4.

(*o*) Jennings *v.* Rigby, 33 Beav. 198; 9 Jur., N. S. 1144.

the date of the entry thereof on the docket, or from the only or last re-registry thereof, as the case may be; which re-registry from time to time was thereby authorized to be made in manner directed by the said act of 2 & 3 Vict., as explained and amended by the act of 18 & 19 Vict. But it is declared to be sufficient to secure such preference if such a memorandum, as was required in the first instance, is again left with the Senior Master of the Common Pleas within five years before the death of the testator or intestate, though more than five years shall have expired since the last previous registration before such last-mentioned memorandum or minute was left, and so toties quoties upon every re-registry (1308).

182. The act of 23 & 24 Vict. c. 38, also provided (*p*), that the registry thereby required of any writ of execution or other due process, or any judgment, statute or recognizance, in order to bind a purchaser or mortgagee, should be made by a memorandum or minute referring to the judgment, statute or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; and that the memorandum or minute should be registered by the Senior Master of the Common Pleas in alphabetical order by the name of the person in whose behalf the judgment was registered, together with the time of the leaving of the minute. And the provisions of the act with regard to writs of execution or other process, or the registry thereof or otherwise relating thereto, were extended mutatis mutandis to writs of execution or other due process issuing on judgments of the Courts of Common Pleas of the County Palatine of Lancaster, and of Pleas of the County Palatine of Durham. But not to Ireland.

183. And by the act of 27 & 28 Vict. (*q*), every writ or other process of execution of any such judgment, statute or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by 23 & 24 Vict. c. 38, but in the name of the debtor against whom the writ or process was issued, instead

(*p*) Sect. 2.

(*q*) c. 112, s. 3.

of, as under the last-mentioned act, the name of the creditor, and no other or prior registration shall be necessary for any purpose, and no reference to any such prior registration shall be required to be made by the minute to be left with the master.

The word "debtor" in this statute includes (*r*) husbands of married women, assignees of bankrupts, committees of lunatics and the heirs or devisees of deceased persons.

184. The necessity for the registration of judgments under the Middlesex and other local registry acts (**172**) is not affected by the provisions of the judgment acts for registration in the Common Pleas and other courts therein mentioned, a judgment registered under the last-mentioned statutes being no charge (*s*) upon lands in a register county until it be registered under the local act.

185. The Court of Common Pleas does not control the Senior Master in the matter of registration, in which he exercises his own jurisdiction. It has been intimated that in case of his refusal to register a judgment the proper remedy would be by mandamus (*t*).

186. The effect of an ordinary judgment under the Irish Act, 3 & 4 Vict. c. 105, s. 28, which corresponded with the English act, 1 & 2 Vict. c. 110, has been taken away by a subsequent statute (*u*), which provides that the creditor under any judgment in a superior court, or decree or order in equity, or rule in a court of common law, or order in bankruptcy or lunacy, having the effect of a judgment, or any judgment obtained in an inferior and removed into a superior court, may file in the superior court or court of equity, or (in case of an order in bankruptcy or lunacy) in the Court of Chancery in Ireland, an affidavit containing the particulars mentioned in the act, which may be registered in the office for registry of deeds, conveyances and wills in Ireland, the creditor being deemed to be the grantee, the debtor the grantor and the debt

(*r*) Sect. 2.

(*s*) Johnson *v.* Holdsworth, 1 Sim., N. S. 106; Ex parte Allcard, Fonbl. Bank. Ca. 217.

(*t*) Ex parte Ness, 5 C. B. 155.

(*u*) 13 & 14 Vict. c. 29, ss. 6—11, amended by 21 & 22 Vict. c. 105. As to the form of the affidavit, see Thorp *v.* Browne, L. R, 2 E. & I. App. 220, and cases there.

the consideration, and the registration of which shall vest in the creditor all the hereditaments mentioned therein, for all the estate and interest possessed or capable of being created by the debtor therein, but subject to redemption on payment of the debt mentioned in the affidavit, and the creditor shall have the same remedies in respect of the hereditaments as if a conveyance subject to redemption had been made and registered; and every such voluntary conveyance made subsequent to the date of the judgment mentioned in the affidavit, as would be void against purchasers for money or other good consideration, shall be void as against the creditor registering the affidavit. But the act does not affect the law concerning conveyances and other acts made to hinder or defraud creditors.

Provision is also made for the entry of a memorandum of satisfaction of the judgment.

Such chattel interests in lands, tenements or hereditaments, as might have been taken in execution under any writ of *fi. fa.* if the act of 3 & 4 Vict. c. 105 (Ireland) had not passed, may be taken in execution notwithstanding the present act. And in the administration of the assets of any judgment debtor dying seised of any estate or interest in lands, tenements or hereditaments, the rights of the judgment creditor are preserved (**1309**).

187. This act does not alter the rule that the judgment only operates upon the estate and interest which the debtor had or might create by virtue of any disposing power, the object being only to compel the creditor to specify the lands upon which the judgment is to attach (*v*). A judgment may be registered under it as a mortgage against an incorporated railway company (*x*).

(*v*) Eyre *v.* M'Dowell, 9 H. L. Ca. 619.

(*x*) Ex parte Bagnal, 13 L. T., N. S. 69. As to the effect of s. 10, as an exception referred to in s. 1, see Ex parte Gerrard, 14 Ir. Ch. Rep. 466.

CHAPTER II. PART 2.—OF LIENS WHICH DO NOT DEPEND UPON POSSESSION.

188. *Of the Lien upon Land for Purchase-money.*
193. *Of Partnership Liens.*
201. *Of Agency Liens.*
202. *Of Liens for Expenditure upon the Property of another, and herein of Salvage Liens and Liens upon West India Estates.*
213. *Of the Liens of Trustees for Expenditure and for the Security of Property subject to Trusts.*
222. *Of the Liens of Attornies and Solicitors upon the Fruits of Judgments and Decrees.*
235. *Of Maritime Liens.*

Of the Lien upon Land for Purchase-money.

188. The lien of a vendor for unpaid purchase-money, though of an equitable character, is recognized at law as well as in equity, and for the purchase-money of chattels as well as of real estate: but with this distinction, that, inasmuch as there is not as a general rule any lien at law without possession (**226**), the vendor of land can have no lien at law for purchase-money after he has executed an absolute conveyance either upon the land or the deeds (*y*), which, though they may actually be in the vendor's possession, belong of right to the owner of the estate. Nor, for the same reason, has the vendor of chattels any lien for the price after he has parted with possession of them. But the vendor's right in equity against real estate is altogether independent of possession, and exists as well after as before conveyance (*z*).

189. The vendor's lien rests upon the plain principle of equity, that he who has obtained possession of property under a contract for payment of the value shall not keep it without payment (*a*).

The lien, therefore, exists generally (the contract not being illegal (*b*)) without distinction as to the freehold, copyhold or

(*y*) Goode *v.* Burton, 1 Exch. 189; 16 L. J., N. S., Exch. 309.

(*z*) Wrout *v.* Dawes, 2 Gif. 381; 4 Jur., N. S. 397.

(*a*) Mackreth *v.* Symmons, 15 Ves. 328.

(*b*) Ewing *v.* Osbaldeston, 2 Myl. & Cr. 88.

leasehold tenure (*c*) of the estate, where the whole or part of the purchase-money is unpaid (*d*), though a receipt may have been given for it (*e*), and whether the consideration be a sum in gross or an annuity (*f*); as against the purchaser, his heir, volunteers, persons having equitable interests, and purchasers with notice of the non-payment of the purchase-money and claiming under the original purchaser (*g*). And where the consideration is expressed to be paid in the deed, but is in fact wholly or partly left unpaid, parol evidence may be given on the part of the vendee of the real transaction, because it is the vendor himself who, by claiming a lien, is the first to set up an equity against the written statement in the deed (*h*).

The lien arises both for the price and compensation payable for land taken by a railway company either under the Lands Clauses Act or by agreement, unless the compensation is the subject of a separate agreement (*i*); and it belongs to the assignee of the vendor, though he claim only by parol assignment (*k*).

190. The principle upon which a lien is raised in the case of vendor and purchaser, upon non-payment of the purchase-money, by mistake or for the convenience of the purchaser, does not apply (*l*) where the vendors, being known by the purchaser to be trustees, the purchaser leaves part of the purchase-money in the hands of one of them under his absolute control, and without the concurrence of the co-trustees or the cestuis que trust.

191. If purchase-money be paid prematurely it will also be a lien on the estate in the hands of the vendor, for the

(*c*) Winter *v.* Lord Anson, 3 Russ. 492; Matthew *v.* Bowler, 6 Hare, 110; Elliott *v.* Edwards, 3 Bos. & P. 181.

(*d*) Harrison *v.* Southcote, 2 Ves. 393; Austen *v.* Halsey, 6 Ves. 483; Elliott *v.* Edwards, supra.

(*e*) Saunders *v.* Leslie, 2 Ba. & Be. 514.

(*f*) Tardiff *v.* Scrughan, cited 1 Bro. C. C. 422; Mackreth *v.* Symmons, 15 Ves. 328; Clarke *v.* Royle, 3 Sim. 499; Matthew *v.* Bowler, 6 Hare, 110; Sugd. V. & P. 866, &c., ed. 11.

(*g*) Elliott *v.* Edwards, Mackreth *v.* Symmons, supra; Gibbons *v.* Braddall, 2 Eq. Ca. Abr. 682, M. N.; Walker *v.* Preswick, 2 Ves. 622; Cator *v.* Pembroke, 1 Bro. C. C. 301.

(*h*) Winter *v.* Lord Anson, 1 Sim. & St. 445.

(*i*) Walker *v.* Ware, &c. Rail. Co., L. R., 1 Eq. 195.

(*k*) Dryden *v.* Frost, 3 Myl. & Cr. 670; and see White *v.* Wakefield, 7 Sim. 401.

(*l*) White *v.* Wakefield, 7 Sim. 417.

purchaser or his personal representatives (*m*); and when the purchaser properly declines to complete, there is a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments (*n*). After the completion of the purchase an evicted purchaser has no lien on the purchase-money, though it be earmarked, as against an assignee of the fund for valuable consideration without notice; but it seems to have been thought that his lien would have prevailed against the vendor (*o*).

192. The purchaser's lien however only exists absolutely where the vendor is owner in fee of the estate. Where he is a mortgagee selling under a power of sale, it does not exist against the mortgagor, but only against the mortgagee to the extent of his interest in the estate. And it is said that if he be only a trustee it may affect the interests of his cestuis que trust (*p*). The lien will not arise if the object of the purchase be an illegal undertaking (*q*), or if the purchaser have through his own default abandoned the contract (*r*): and a like consequence ensues as to the lien of the vendor where the contract has gone off by his default (*s*) (**1471**).

Of Partnership Liens.

193. The separate share or interest of each of several partners, being only that which remains after the discharge of all liabilities to which the joint property is subject (*t*), and every assignment of or execution against the partnership estate, in respect of the private debt of any partner, being subject to those liabilities (*u*), it follows that, on the dissolution of the partnership by the death or retirement of a partner, the retiring partner, or the representatives of the deceased,

(*m*) Per Sir Thomas Clarke, M. R., 1 W. Bl. 150; and see 15 Ves. 345; 2 Sugd. V. & P. 857, ed. 11.

(*n*) Rose *v.* Watson, 10 Jur., N. S. 297; 33 L. J., Ch. 385; 10 H. L. C. 672; Wythes *v.* Lee, 3 Drew. 396.

(*o*) Cator *v.* Earl of Pembroke, 1 Bro. C. C. 301; 2 id. 282.

(*p*) Wythes *v.* Lee, supra.

(*q*) Ewing *v.* Osbaldeston, 2 Myl. & Cr. 88.

(*r*) Dinn *v.* Grant, 5 De G. & S. 451.

(*s*) Oxenham *v.* Esdaile, 2 Y. & J. 493; 3 id. 262; Esdaile *v.* Oxenham, 3 B. & C. 225.

(*t*) See Doddington *v.* Hallet, 1 Ves. 496, 499; Young *v.* Keighly, 15 Ves. 557.

(*u*) Taylor *v.* Fields, 4 Ves. 398.

have a lien (*x*) at law (*y*), as well as in equity, on the partnership estate for the satisfaction of all demands arising out of the joint business prior to the dissolution; or for allowances or payments agreed to be made upon the dissolution (*z*) to the person claiming the lien. And if one partner draw a bill in the name of the firm to secure his separate debt, the separate estate of the other partner will have a lien against the share of the surplus of the joint estate belonging to the drawer of the bill (*a*).

194. This lien, which holds good against the representatives and assignees in bankruptcy of the continuing partners (*b*), has been distinguished (*c*) from the ordinary lien or mortgage upon stock in trade (**456**), on the ground that the latter binds the stock in trade through all its changes; not preventing the sale of old and the acquirement of new stock, but subsisting upon the constantly changing stock as it may exist from time to time: whereas the lien, which arises in partnership matters is a right to the property in the thing itself, preventing the sale of the existing stock without the consent of the executors of the surviving partner, and not extending to stock subsequently purchased. This distinction, however, seems to be contrary to the view taken of the nature of the lien by Lord Hardwicke, the correctness of which does not appear to have been otherwise questioned; for he, also referring to the effect of a mortgage of stock and goods in trade, held in two cases (*d*), which arose out of the same transactions, that the lien of a partner on dissolution was not appropriated (i. e., limited) to the stock brought in, but extended to every thing coming in lieu during the continuance or after the determination of the partnership.

It is also clear, that the lien is no longer available after the continuing partner has bonâ fide assigned the property to a

(*x*) West *v.* Skip, 1 Ves. 239, 456; Skip *v.* Harewood, 2 Sw. 586.

(*y*) Per Parke, B., in Hague *v.* Dandeson, 2 Exch. 741.

(*z*) Ex parte Rowlandson, 2 Ves. & B. 172.

(*a*) Ex parte King, 17 Ves. 115.

(*b*) Stocken *v.* Dawson, 9 Beav. 239.

(*c*) Payne *v.* Hornby, 25 Beav. 280; 4 Jur., N. S. 446.

(*d*) Skip *v.* Harwood, 2 Sw. 586, 588; West *v.* Skip, 1 Ves. 239, 244.

purchaser for value (*e*). It has been said that the right of a retiring partner cannot be higher, than if there had been in the continuing partner an express trust to sell and apply the proceeds in payment of the partnership debts, in which case the purchaser would not be bound to see to the application of the purchase-money. Upon this principle it seems that a bonâ fide sale at any time would bar the lien; but in the case cited (*f*) six years had elapsed since the dissolution, an interval after which a purchaser might reasonably suppose that all debts had been barred or paid.

And even where on a dissolution the partnership property has been assigned (*g*) to the continuing partner, and he has undertaken to pay the debts and to indemnify the retiring partner against them, or the property has been specifically divided between the late partners (*h*), the lien is at an end.

195. The lien extends to mining property (*i*), and to all other real and personal estate which is vested in the partners, for the purposes of the partnership, as joint tenants; and therefore to those joint purchases of real estate, in which, by reason of the advance of the price by the purchasers in unequal shares (*k*), or of expenditure of money by one of them in repairs or improvements (*l*), the transaction may be treated as in the nature of a partnership, i. e., in which a profitable return of the outlay is expected; as distinguished from a mere joint occupation not of that character, though arising under a joint ownership (*m*).

196. It does not however arise as to property which is held in common by part owners. Upon a share in a ship (which is generally so held) there is therefore no lien in favour of the owners of the other shares in respect of advances for outfit and for their share of freight (*n*), though the shares of the

(*e*) West *v.* Skip, 1 Ves. 339; Campbell *v.* Mallett, 2 Sw. 575.

(*f*) In re Langmead's Trusts, 20 Beav. 20; affirmed on the same and other grounds, 7 De G., M. & G. 353.

(*g*) Ex parte Ruffin, 6 Ves. jun. 119.

(*h*) Lingen *v.* Simpson, 1 Sim. & St. 600.

(*i*) Fereday *v.* Wightwick, 1 R. & M. 45.

(*k*) Per Lord Hardwicke, in Rigden *v.* Vallier, 2 Ves. 256.

(*l*) Lake *v.* Gibson, 1 Eq. Ca. Abr. 291.

(*m*) Kay *v.* Johnston, 21 Beav. 536.

(*n*) Ex parte Young, 2 Ves. & B. 242; Ex parte Harrison, 2 Rose, 76.

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freight or earnings are so liable, and cannot be claimed until payment of the due proportion of advances for outfit and expenses (*o*).

197. As it is only on the dissolution of the partnership that the equity arises against the partnership estate, no lien accrues (in the absence of a special contract) to a company against the shares of a proprietor for a debt due from him to the company, where the shares are transferable like stock subject only to the approval by the company of the transferee, the transfer working no dissolution and the shareholder in such a case being considered as a stranger as to his borrowing from the company (*p*). An express stipulation in the deed of settlement, notice of which is indorsed on the share certificates, that the company shall have a lien on the shares of proprietors who are customers of and indebted to the company, and that the shares shall not be transferred without the consent of the directors, will prevail against the assignees of a bankrupt shareholder possessed of the certificates, the directors being able to refuse their consent to the transfer (*q*), though, where the shareholder has full power to transfer, the shares will pass to his assignees (*r*). An agreement, which gives a lien to a company on the shares and stock of a shareholder, also gives a lien on the dividends (*s*).

198. The benefit of the lien is carried on to creditors of the partnership, who, although before the dissolution they have no lien at law or in equity against the partnership effects, nor any right but that of suing and taking out execution (*t*), are entitled after dissolution, by virtue of the equities between the partners themselves, and so long as those equities subsist (but by no other right), to obtain satisfaction of their claims out of the partnership estate (*u*). Where the dissolution has been caused by death, the assets of the deceased partner are equally liable with the estate of the survivor, and may be resorted to

(*o*) Holderness *v.* Shackels, 8 B. & C. 612; Danson & Ll. Merc. Ca. 201; Green *v.* Briggs, 6 Hare, 395.

(*p*) Pinkett *v.* Wright, 2 Hare, 120; 12 Cl. & F. 764.

(*q*) Ex parte Plant, 4 D. & C. 160.

(*r*) Nelson *v.* London Assurance Co., 2 Sim. & St. 292.

(*s*) Hague *v.* Dandeson, 2 Exch. 741.

(*t*) Per Lord Eldon, 6 Ves. 126.

(*u*) Ex parte Rowlandson, 2 V. & B. 172; Ex parte Kendall, 17 Ves. 514; Stuart *v.* Ferguson, Hayes, Ir. Ex. R. 452; per Joy, C.B., Ex parte Ruffin, 6 Ves. 119.

without regard to the state of the accounts (*x*) between the deceased and the surviving partners, and it is open to the creditor, if he think fit, to resort in the first instance to the deceased partner's assets, leaving his representatives to recover against the survivor (*y*).

199. The equity of the creditor, being only founded upon the partnership relation, was held not to arise against the estate of a deceased partner in respect of debts incurred by a surviving partner while carrying on the business and claiming to be absolute owner of the whole estate (of which he was afterwards held to be a trustee), and not under the authority of the representative of the deceased, who was never in the situation of a partner with the trustee (*z*).

200. The mere payment of interest on the debt, after the death of one of the partners, by the surviving members of the firm as such, will not prevent the running of the Statute of Limitations against the debt as to the estate of the deceased partner, though one of the survivors was the executor of the deceased (*a*). And the estate of the latter may be released by the acceptance by the creditor of the survivors as his debtors (*b*).

Of Agency Liens.

201. An agent who has advanced money, or incurred liability on account of his principal, is protected by a lien on the property in respect of which the advances were made or on the produce of the sale of it. An army agent, therefore, in respect of his advances to an officer for his outfit, has a lien on the purchase-money of his commission (*c*); and a person, who has carried on trade for another, upon the stock and debts; of which he may restrain the assignees in bankruptcy of his principal from taking possession (*d*). An agreement that

(*x*) Per Lord Eldon, Vulliamy *v.* Noble, 3 Mer. 593; Devaynes *v.* Noble, 2 R. & M. 495.

(*y*) Wilkinson *v.* Henderson, 1 M. & K. 589.

(*z*) Stocken *v.* Dawson, 9 Beav. 239; affirmed, 8 Feb. 1848.

(*a*) Way *v.* Bassett, 5 Hare, 55; see Harris *v.* Farwell, 13 Beav. 403; 15 id. 31.

(*b*) Brown *v.* Gordon, 16 Beav. 302.

(*c*) Lawrie *v.* Banks, 4 Jur., N. S. 299.

(*d*) Foxcraft *v.* Wood, 4 Russ. 487; and see Bristow *v.* Whitmore, 9 H. L. C. 391.

the lender of money shall be employed to sell and shall be repaid out of the proceeds of goods expected to be purchased, there being no contract for the purchase of such goods, will not however give him a lien upon goods which are afterwards purchased and sent, but were not paid for with the money advanced (*e*).

Of Liens for Expenditure upon the Property of another, and herein of Salvage Liens and Liens upon West India Estates.

202. As a general rule there is no lien in favour of a person merely because his money has been expended on the property or for the benefit of another.

No such right belongs to a tenant in common against the share of his co-tenant for payments in respect of the estate (*f*); nor to one joint owner for money lent to another (*g*), except it be in the nature of a partnership transaction (**195**); nor to a firm against property purchased by one of the partners and paid for out of partnership money (*h*); nor to a person who has laid out money on property which he has bought without a title (*i*); though a lien has been allowed (*k*) to a husband for purchase-money paid by him under the mistake that in right of his wife he was entitled to the benefit of her contract for purchase,—in substitution for the vendor's lien which he discharged,—and also a lien for the cost of substantial improvements made under the same mistake. And so where a person has laid out money upon the faith of the execution of a contract by another; as where one who had purchased from a remainderman upon the representation that the tenant for life would concur in the sale, which he afterwards refused to do, took possession of the estate and cleared off an incumbrance thereon and was allowed a lien for the expenditure (*l*). And in the case of an agreement for a lease

(*e*) Deane *v.* Byrnes, 13 W. R. 299.

(*f*) Ex parte Young, 2 Ves. & B. 242, notwithstanding Doddington *v.* Hallet, 1 Ves. 497.

(*g*) Kay *v.* Johnston, 21 Beav. 536.

(*h*) Walton *v.* Butler, 29 Beav. 428.

(*i*) Ridgway *v.* Roberts, 4 Hare, 106.

(*k*) Neesom *v.* Clarkson, 4 Hare, 87.

(*l*) Ludlow *v.* Grayall, 11 Price 58.

providing that the tenant shall improve and shall be repaid in case the lease be not granted (*m*). But if money be expended on improvements in consideration of the granting of a lease at an additional rent, the tenant or his assignees rejecting the lease cannot claim a lien for the expenditure (*n*).

Even where money is lent for the purpose of discharging an incumbrance: as by a solicitor in the name of his client, an executor, to pay off a debt on the testator's estate (*o*), or to a guardian to discharge an incumbrance on the infant's estate, there will, under ordinary circumstances, be no lien without a special contract (*p*): though where the personal estate of a lunatic was applied in discharge of a mortgage upon his real estate, a lien upon the latter was allowed to his next of kin, because the nature of a lunatic's estate cannot be changed as between his real and personal representatives (*q*).

203. The rule is also different as to advances in the nature of salvage (**1268**), viz., such as are made for the redemption of property, for renewal fines, or other payments made by way of salvage; for then, whether he who pays the money fills the character of a trustee, joint tenant, tenant for life, or mortgage or other creditor, and even though claiming to be a creditor his debt is disputed (*s*), he has a lien on the estate or interest in the property discharged of the person for whose benefit the payment was made. A married woman who, out of her separate estate, has paid the premiums on policies effected as a provision under her marriage settlement, is also entitled to such a lien (*t*). And so is the assignee of a policy for premiums paid after the assignment, with interest from the dates of the several payments, as against persons who have established a prior title to the policy (*u*). But the trustee of a policy who makes or obtains such advances can neither obtain nor create such a lien if he be, or in the due perfor-

(*m*) Middleton *v.* Magnay, 2 H. & M. 333.

(*n*) Ex parte Ladd, 3 D. & C. 647.

(*o*) Christian *v.* Field, 2 Hare, 177.

(*p*) Hooper *v.* Eyles, 2 Vern. 479.

(*q*) Weld *v.* Tew, Beat. 266.

(*s*) Manlove *v.* Bale, 2 Vern. 84; Lacon *v.* Mertins, 3 Atk. 4; Hamilton *v.* Denny, 1 Ba. & Be. 199; Jones *v.* Jones, 5 Hare, 465; Fetherstone *v.* Mitchell, 9 Ir. Eq. Rep. 480.

(*t*) Burridge *v.* Row, 1 Y. & C. C. C. 183.

(*u*) West *v.* Reid, 2 Hare, 258.

mance of his trust ought to be, in possession of funds applicable for the purpose (*x*).

204. Another class of equitable salvage liens arises in connection with certain undertakings, such as mines and alum works, by reason of the exigencies of which, and of the perishable nature of the works by which they are carried on, a lien is allowed to the manager, whether he be one of several part owners or otherwise, for the expenses incurred and the advances made in the working of them (*y*). Of this nature is the cultivation of West India estates, which cannot be carried on without the assistance of consignees and agents at home, and seldom without pecuniary or other supplies; for which, therefore, whether for the immediate purposes of the estate (*z*), or for the interest of incumbrances (*a*), a lien is allowed upon the estate independently of the lien which may arise from any particular course of dealing between the parties (*b*), provided the lien be not excluded by a contract which expressly defines and limits the nature and extent of the consignee's security (*c*) (**1619**).

205. The right is allowed as well to the manager of the estate abroad, where duly authorized, as to the consignee at home of the produce (*d*); and it will arise in favour of a manager, whether he be appointed by the owner or trustee of the estate, or by the Court of Chancery (*e*). Where the appointment is made by the court, in a suit properly constituted, it is made on behalf of all the parties interested, and the manager is entitled to his commission and allowances, and to a lien for the balance due to him, if not as manager, as the officer of the court, entitled to be repaid all advances and all

(*x*) Clack *v.* Holland, 19 Beav. 262.

(*y*) Per Lord Eldon, in Scott *v.* Nesbitt, 14 Ves. 438; Sayers *v.* Whitfield, 1 Knapp, P. C. 133.

(*z*) Scott *v.* Nesbitt, supra; Fraser *v.* Burgess, 13 Moo. P. C. 314; 6 Jur., N. S. 327; Sayers *v.* Whitfield, supra. As to the limited liens subsisting by enactment in some of the West India Islands, see Burge, Col. Law, 3, 359; and see 14 Ves. 441.

(*a*) In re Greathead, Cust's W. I. Incumbered Estates Acts, 219, ed. 2.

(*b*) See Simond *v.* Hibbert, 1 R. & M. 719.

(*c*) In re Leith's Estate, Chambers *v.* Davidson, L. R., 1 P. C. 296.

(*d*) Fraser *v.* Burgess, supra; Bernard *v.* Davies, 31 Beav. 429; 9 Jur., N. S. 34.

(*e*) Scott *v.* Nesbitt, Bernard *v.* Davies, supra; Daniel *v.* Trotman, 1 Moo. P. C., N. S. 123; 9 Jur., N. S. 583; Fraser *v.* Burgess, per Lord Kingsdown.

expenses incurred in executing the trust under its authority (*f*).

206. No lien arises in favour of the owner himself of an incumbered estate, because it is presumed that he makes the advances for his own benefit in respect of the equity of redemption (*g*). And where the owner of an estate, subject to charges, has appointed a manager, no lien arises by virtue only of that appointment against the incumbrancers, whose title is prior to that of the owner, and who have nothing to do with the expenditure: but if the incumbrancers, or other persons interested, have so recognized the possession of the manager, that he can be considered as acting on their behalf and for their benefit, the same consequences will follow as if he had been appointed by the court; and they will not be allowed to dispute a lien for expenditure, which, by their tacit acquiescence he has been encouraged to make (*h*). If, however, a mortgagee, not being in possession, be not a party to a suit in which the manager is appointed, or if he allow the mortgagor to manage the estate and receive the produce, he will not be bound by the previous management (*i*). He cannot have an account of the past produce, and is not bound by the costs of management subsequent to the mortgage (**1567**).

207. Where the appointment of the manager is by a tenant for life or other person who has but a limited interest, the lien is only against the person who makes the appointment; and after notice from the remainderman, the manager can only hold as mortgagee in possession under his existing lien, or adversely to the owner; in which case he cannot claim a lien for the expenses of management (**1619**). But a lien will arise in respect of supplies made for the use of the crops which were produced next after the death of the tenant for life (*k*). And the tenant for life himself has a lien upon the inheritance for necessaries supplied (*l*).

(*f*) Morrison *v.* Morrison, 7 De G., M. & G. 214; Fraser *v.* Burgess, supra; Farquharson *v.* Balfour, 8 Sim. 210.

(*g*) In re Greatheed, Cust's W. I. Incumbered Estates Acts, 235, ed. 2.

(*h*) Fraser *v.* Burgess, Bernard *v.* Davies, supra; Morrison *v.* Morrison, 2 Sm. & G. 564.

(*i*) Bernard *v.* Davies, supra.

(*k*) Id.

(*l*) Per Lord Eldon, Scott *v.* Nesbitt, 14 Ves. 442.

If the incumbrancer take possession of and manage the estate himself, or suffer the court to do so, it seems that any balance which becomes due to the consignee is the personal debt of the mortgagee, and forms also a lien upon the estate (*m*). And if the estate be managed by the court, the consignee's claim will be admitted against every fund arising therefrom, which is under the control of the court; and therefore (*n*) against a fund representing part of the corpus, and which was realized after the discharge of the consignee, and before the mortgagee was party to the suit in which the consignee claimed his lien: the mortgagee's interest having been the same throughout, and the expense of keeping up the estate a liability to which he was always subject, and which he cannot evade by leaving the management to the court.

208. But the consignee's claim against the corpus is admitted only on the final settlement of accounts upon his discharge, and pending the consigneeship he cannot come to the court whenever a balance is due to him for payment out of the estate (*o*).

If he require payment when his discharge has not been already ordered, he must therefore pray that he may be discharged, and may pass his final accounts, and that so much as is necessary of the fund in court, representing the corpus, may be paid him in discharge of the balance to be found due, and for his costs: and for the purpose of thus praying for his discharge, he may be allowed to amend his petition (*p*).

209. The lien extends to all payments made by the consignee on account of charges on the estate, or under the orders of the court (*q*); and interest at £4 per cent. will be allowed as compensation for the delay in payment (*r*); and in the absence of mala fides the lien will not be affected by the

(*m*) Scott *v.* Nesbitt, Morrison *v.* Morrison, supra.

(*n*) Morrison *v.* Morrison, supra; Lyne *v.* Thompson, 30 Beav. 542; In re Tharp, 2 Sm. & G. 578.

(*o*) Farquharson *v.* Balfour, 8 Sim. 210.

(*p*) Morrison *v.* Morrison, 2 Sm. & G. 564.

(*q*) Shaw *v.* Simpson, 1 Y. & C. C. C. 732.

(*r*) Morrison *v.* Morrison, supra.

injudicious or wasteful management of the manager appointed by the consignee (*s*).

It has been held that a trustee of the estate who has acted as consignee may enjoy a lien for his advances; but it seems that he cannot for commission (*t*).

210. Persons who have paid money in discharge of insurances, upon property which has been destroyed or injured, have also a lien upon whatever is received by the owner in the form of salvage. The money received by the owner of a damaged ship, from the person responsible for the damage, is therefore liable to the insurer for what he has paid under his insurance; and the lien is extended in favour of the insurers of ships captured by an enemy, to such as are taken by their owners by way of reprisal (*u*).

211. A lien is also given for expenditure upon property, where the owner has allowed the person who has laid out the money to do so in the expectation that he will receive the benefit of it. As where (*x*) a father allowed his sons the use of land for their business, without making any agreement as to the terms of the occupation, and they expended large sums in building, and also supplied the father with goods in respect of his outlay in building before their occupation; a lien was allowed both for their own expenditure and for the value of the goods supplied. Here the value of the land was small compared with the outlay, and the latter (besides other circumstances) was far more than a reasonable compensation for the value of the occupation. But where these conditions were reversed, as where (*y*) a father allowed his son-in-law to live in his house rent free for nineteen years, the latter was denied a lien for his outlay for repairs, and for the renewal of a small part of the building; and it was said that in such a case there was an implied contract to keep the premises in repair, and that the extraordinary expenditure incurred was not of itself enough to support the claim.

(*s*) In re Harriott, Cust's W. I. Incumbered Estates Acts, 271, ed. 2.

(*t*) In re Harriott, Cust, 271, ed. 2; 8 L. T., N. S. 854.

(*u*) White *v.* Dobinson, 14 Sim. 273; Randal *v.* Cockran, 1 Ves. 98.

(*x*) Unity Bank *v.* King, 25 Beav. 72.

(*y*) Millard *v.* Harvey, 10 Jur., N. S. 1167.

212. A person who has agreed to advance money for the purposes of an undertaking has no lien on the profits of it unless he has entirely fulfilled his agreement. He cannot claim (*z*) a share of the profits proportioned to his advance. And the statement in the prospectus of a company, that deposits will be returned if no allotment of shares be made, will not create a lien in respect of deposits paid to the credit of the company (*a*).

Of the Liens of Trustees for Expenditure and for the Security of Property subject to Trusts.

213. The lien is allowed where the lender is a trustee advancing his own money for the benefit of the trust. For a trustee has a lien on the trust estate for money properly expended thereon (*b*); and where the director of a company made advances to complete a purchase and for other proper purposes of the company, the lien was allowed (*c*), although the conveyance recited that the payment was made with money belonging to the company. But trustees can have no lien for costs or expenditure incurred in breach of their trust, at least as against the shares of those of their cestuis que trust who have not actively induced them to commit the breach of trust, or whose interest in their shares is inalienable (*d*).

Where all parties are ordered to be paid their costs out of a fund, an executor is not deprived of his lien by complying with an order to pay the fund into court (*e*).

214. For the security of the trust fund itself, if the trustee permit the cestui que trust to receive and apply it in the purchase of other property, or if he advance it to him for the purpose of investment (*f*), or if it be improperly invested (*g*), a lien will also arise. So if part of the trust fund be advanced

(*z*) Twynam *v.* Hudson, 8 Jur., N. S. 685.

(*a*) Moseley *v.* Cressеys, &c. Co., L. R., 1 Eq. 405.

(*b*) Darke *v.* Williamson, 25 Beav. 622; 4 Jur., N. S. 1009.

(*c*) Imperial Salt and Alkali Co., In re, 2 W. R. 122.

(*d*) Leedham *v.* Chawner, 4 K. & J. 458.

(*e*) Blenkinsopp *v.* Foster, 3 Y. & C. 207.

(*f*) Price *v.* Blakemore, 6 Beav. 507; Birds *v.* Askey, 24 Beav. 618.

(*g*) Mant *v.* Leith, 15 Beav. 524.

to the cestui que trust, the advance may be set off in accounting for his share (*h*). And if the executor himself be indebted to the testator's estate, there will be a lien against his interest under the will in preference to the right of a mortgagee of the executor (*i*). And generally, where money subject to trusts is applied in the purchase or improvement of property, into which it can be traced by sufficient evidence, there will be a lien for it upon that property (*k*). The equity will therefore arise where a husband, having acquired possession of a settlement fund upon his undertaking to lay it out according to the trusts (*l*), or of the wife's separate estate (*m*), with the intention or under a promise to invest it for her benefit, has purchased land in his own name either wholly or partly with the money so received. And where the fund was held upon trust for the husband and wife during their joint lives, and for the survivor absolutely, money expended by the husband shortly after the marriage was assumed under the circumstances to have been taken from the capital of the fund, and the wife surviving was held to have a lien for the amount (*n*).

The lien may arise in the simple case where one person has laid out the money of another in a purchase, as well as where the purchaser is a properly constituted trustee (*o*); but against no person who becomes possessed of the fund will any equity exist, unless it can be shown that the money invested was the actual fund which is subject to the trust, for otherwise there is no room for the presumption (*p*), upon which the

(*h*) Ex parte Makins, 2 M., D. & De G. 508.

(*i*) Cole *v.* Muddle, 10 Hare, 186.

(*k*) Lane *v.* Dighton, Ambl. 409; Williams *v.* Thomas, 2 Dr. & Sm. 29; 8 Jur., N. S. 250; Harford *v.* Lloyd, 20 Beav. 310.

(*l*) Lane *v.* Dighton, supra; Att.-Gen. *v.* Whorwood, 1 Ves. 534; Wilson *v.* Foreman, cited and explained, 10 Ves. 519.

(*m*) Darkin *v.* Darkin, 17 Beav. 579; Scales *v.* Baker, 28 Beav. 91.

(*n*) Williams *v.* Thomas, 2 Dr. & Sm. 29; 8 Jur., N. S. 250.

(*o*) Ryal *v.* Ryal, Ambl. 413; Balguey *v.* Hamilton, id. 414.

(*p*) Perry *v.* Phelps, 4 Ves. 107; 17 id. 173. It seems to have been on account of the want of room for this presumption that where a tenant for life by fraud procured a fine to be levied, and sold and made investments which could be identified, no specific lien was held to arise on the investments. The reason given is, that no agreement had been made so as to make this particular fund answerable. A general charge was however allowed against the estate of the tenant for life. (Newcomb *v.* Burdon, 2 Anst. 343.)

relief is granted, that the purchase was made in the execution of the trust. The advance must also have been of such a kind that the trust does not cease with it. Trust money advanced to an infant in the bonâ fide exercise of a power of advancement cannot be followed, though it be not applied to the purpose for which the advance was intended (*q*).

215. The effect of the investment in real estate of personalty which is subject to a trust, is to create a lien on the estate for the amount invested; and if the money be clearly shown to have been applied in the purchase, it is not material that it was applied indirectly; as in the repayment of money borrowed for the immediate purchase-money (*r*). The purchased estate cannot be claimed as belonging to the trust, but the lien may prevail to that extent also, if it be shown that there was an intention between the persons interested that the property purchased should be substituted for the money (*s*).

216. The lien may also be fixed upon other property of the person who has received the fund.

Thus the trustees of a will who had wrongly paid over trust monies were held (*t*) entitled to a lien for it against the interest of the recipients in other property which was subject to the trusts, even as against assignees for valuable consideration. And where a married woman, entitled to a life interest in stock and to a life rent-charge on real estate, fraudulently appropriated the stock, the rent-charge was held liable to make it good as against an assignee with notice of the fraud (*u*). The like relief was given against money paid into court which belonged to a husband absolutely under his marriage settlement, to replace his wife's separate estate which had been lent to him and lost by his insolvency (*x*).

217. If mortgagors, empowered to raise money for a special purpose, apply it in excess of their power in the discharge of

(*q*) Lawrie *v.* Banks. 4 Jur., N. S. 299.

(*r*) Lewis *v.* Madocks, 8 Ves. 150; 17 id. 48; Williams *v.* Thomas, 2 Dr. & S. 29; 8 Jur., N. S. 250; Hopper *v.* Conyers, L. R., 2 Eq. 549.

(*s*) Wadham *v.* Rigg, 10 W. R. 365; and cited 2 Dr. & S. 34.

(*t*) Dibbs *v.* Goren, 11 Beav. 483.

(*u*) Woodyatt *v.* Gresley, 8 Sim. 180.

(*x*) Thorp *v.* Thorp, 1 K. & J. 438.

prior mortgages upon the same and other property, the sum so misapplied is considered as trust money in the hands of the mortgagors, applicable specifically to the payment of the mortgage debts created under the power; and there is a lien on the property which was subject to the paid-off mortgages for the amount applied, so far as that property still remains in the hands of the mortgagors, but not against purchasers without notice (*y*).

218. For money or other property in the hands of a factor or broker for a special purpose, there is also a lien in the nature of a trust, in favour of the person by whom it was delivered or paid, as a corollary of the rule that the person intrusted therewith for the special purpose has no lien thereon; and this equitable right is fully recognized by courts of law, independently of any actual possession of the fund. Hence if goods be intrusted to a factor for sale, and at the time of his death or bankruptcy they remain in specie; or having been sold, the proceeds have either not been received by the factor, or have been employed in the purchase of other goods or re-invested, and the investments or goods can be identified as the produce of that particular money, the principal is entitled; and if not already in possession may enforce his right either at law or in equity (*z*).

And bills in the hands of a banker are like goods in those of a factor: if deposited for a special purpose with the banker or his agent, either before or after, but without notice of the bankruptcy, the property of the original owner is not divested; and if the banker's assignees allow the agent to retain such bills in satisfaction of his own lien, they having received the same advantage as if the agent had remitted the amount, must make it good to the depositor (*a*).

But if, in the case of a factor, he have already received the proceeds arising from the sale of the goods (*b*), or if bills

(*y*) Trevilian *v.* Mayor of Exeter, 18 Jur. 1019.

(*z*) Whitecomb *v.* Jacob, 1 Salk. 160; Scott *v.* Surman, Willes, 400; Ex parte Sayers, 5 Ves. 169; Taylor *v.* Plumer, 3 M. & S. 562; Hassel *v.* Smithers, 12 Ves. 119; Giles *v.* Perkins, 9 East, 13.

(*a*) Ex parte Cunningham, 3 D. & C. 58.

(*b*) Scott *v.* Surman, Whitecomb *v.* Jacob, supra.

deposited, being indorsed, have been negotiated (*c*) without notice of the title of the true owner, the right of the consignor of the goods or of the depositor of the bills is at an end, and he has no claim against the person by whom the possession has been acquired; the possession and property under such circumstances being inseparable. If by the indorsement the bills be made payable to the agent for the account of the principal, it will be sufficient notice of the principal's title (*d*).

219. Where a debtor deposits deeds as security for his debt, and afterwards, having access to the place of deposit, he withdraws them without the consent of the creditor, the latter has a lien on all the deeds belonging to the debtor at the time of the deposit; and it is immaterial that the deeds were left in the debtor's custody as the solicitor of the creditor, or whether the abstraction of the deeds was accidental or improper (*e*).

220. Where an estate has been wasted by a person who has but a limited interest in it, a lien arises for the amount of the injury against the profits received in his time in favour of the remainderman, and that against the incumbrancers of the person who committed the waste, though claiming under securities made before it was committed (*f*).

221. A landlord who neglects to distrain has no lien for his rent upon the proceeds of the sale of the chattels which he might have seized. And it is no excuse for his negligence that the property was in the possession of a receiver of the Court of Chancery; his proper course in such a case being to issue his distress and lodge it with the sheriff, and then to apply to the Court for leave to enforce it (*g*).

Of the Lien of Attornies and Solicitors upon the Fruits of Judgments and Decrees.

222. By a practice, which was said by Lord Mansfield (*h*) to be not very antient, attornies and solicitors are entitled,

(*c*) Bolton *v.* Puller, 1 Bos. & P. 546; Collins *v.* Martin, id. 648.

(*d*) Treuttel *v.* Barandon, 8 Taunt. 100.

(*e*) Mason *v.* Morley, 11 Jur., N. S. 459.

(*f*) Briggs *v.* Earl of Oxford, 1 Jur., N. S. 817.

(*g*) Sutton *v.* Rees, 9 Jur., N. S. 456; 33 L. J., N. S., Ch. 437.

(*h*) In Wilkins *v.* Carmichael, Dougl. 101.

both at law and in equity, to a general lien for their charges upon documents in their hands belonging to their clients; and also to a particular lien (*a*), upon the fruits of a judgment or decree obtained by the client in the suit in which the attorney or solicitor was employed, for his costs in that suit. The former of these rights, depending upon the actual possession of the documents, will be considered in that part of the subject which relates to possessory liens (**273**); the latter, purely of an equitable character, though recognized and enforced as fully at law as in equity, is now to be treated of as a lien not depending upon possession.

223. An attorney or solicitor is entitled to a lien upon a fund which has been recovered by his exertions, for the costs incurred in recovering it, and the lien is as applicable to money awarded to the client by an arbitrator, or payable to him under a compromise, as to that which he recovers by virtue of an adverse judgment (*b*); and also to the property dealt with under the decree in an ordinary administration suit, though it should turn out that the client himself takes no interest in the property (*c*).

But whether by judgment, or by compromise, the fund must have been recovered by the diligence of the solicitor; he has no lien therefore in respect of costs which he could not have recovered in his client's name upon a fund held under an arrangement by a person who could not have been compelled to pay them (*d*).

In equity, where a decree is as much for the benefit of the defendant as of the plaintiff, the solicitor of the former, as well as of the latter, enjoys the lien (*e*).

224. It extends only to the costs of the particular matter, or of a matter immediately connected therewith (*f*); but if an

(*a*) Welsh *v.* Hole, Dougl. 238.

(*b*) Ormerod *v.* Tate, 1 East, 464; Cowell *v.* Betteley, 10 Bing. 432; Davies *v.* Lowndes, 3 C. B. 823.

(*c*) Lloyd *v.* Mason, 4 Hare, 132; Bailey *v.* Birchall, 2 H. & M. 371; the latter case under 23 & 24 Vict. c. 127 (**227**).

(*d*) Townsend *v.* Reade, 4 L. J., N. S., Ch. 233.

(*e*) Id.

(*f*) Bozon *v.* Bolland, 4 M. & C. 354; Lann *v.* Church, 4 Mad. 391; Hall *v.* Laver, 1 Hare, 571; per Lord Langdale, in Lucas *v.* Peacock, 9 Beav. 177; see Stephens *v.* Weston, 3 B. & C. 535.

action be brought at law, and the defendant commence a suit in equity to assist his defence, in which he is ordered to pay a sum of money to the plaintiff at law, the fund is considered to have been recovered by means of the original action, and the attorney of the plaintiff at law will be entitled to the lien (*g*).

225. As to funds not administered in court, the solicitor employed by a trustee has no lien upon the trust fund, though the trustee himself may retain his costs (*h*). But he generally has a limited lien upon his client's money actually in his hands (*i*); and upon money which has been placed in his hands to abide the event of a litigation, when his client has established his right to it (*k*); and this lien extends to the solicitor of a married woman in a matrimonial suit, who has a lien upon monies received by him on her account in the course of the suit, including alimony when she has allowed it to be received by the solicitor, to whom by the course of the court it cannot be paid without her consent in writing (*l*).

226. It was said by Lord Hardwicke, that a solicitor had a lien on real estate recovered in the hands of the person who recovered it, but not in the hands of the heir, unless the suit were revived; and a solicitor was therefore allowed (*m*) to stand in the place of the committee of a lunatic against his real estate in respect of the costs of suing out the commission.

The solicitor's right in lunacy matters has been admitted in other cases, where real estate does not appear to have been in question (*n*). But the principle of the lien upon a recovered fund in court has been decided not to extend, either at law or in equity, to real estate so recovered, upon the ground, among others, that such a lien would be an evasion of the Statute of Frauds; and by this decision, affirmed on this point by the House of Lords, the doctrine of Lord Hardwicke, so far as it allowed a lien for costs against real

(*g*) Sympson *v.* Prothero, 3 Jur., N.S. 711.

(*h*) Worrall *v.* Harford, 8 Ves. 4.

(*i*) Miller *v.* Attlee, 3 Exch. 799.

(*k*) Hanson *v.* Reece, 3 Jur., N. S. 1204.

(*l*) Ex parte Bremner, L. R., 1 Mat. 254.

(*m*) Barnesley *v.* Powell, Ambl. 102.

(*n*) See Ex parte Price, 2 Ves. 407; Chester *v.* Rolfe, 4 De G., M. & G. 798; 18 Jur. 114.

estate, was overruled (*o*). But the reasons given for the judgment of the House of Lords are entirely different from those upon which the decision in the court below was founded. The remarks of Lord Chelmsford, C., with which the other lords expressed their general and particular concurrence (*p*), were,—that "to hold that a solicitor, obtaining a real estate for his client could be entitled to a lien upon it for his costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. *There can be no lien upon any property unless it is in the possession of the party who claims the lien.* But if an estate be recovered by a solicitor, or if, through a solicitor it is conveyed to the client, the solicitor is not in possession of the estate, but his client is in possession of it. All that the solicitor has are the deeds and documents. He has a lien upon them. He may render them available for the purpose of establishing his claim. But it is quite clear that he cannot say that he has any such lien upon the estate, as within the principle of the doctrine which I have suggested can entitle him to maintain it as a charge upon the property." It is indeed true that at law there is generally no lien without possession;—but even at law liens of an equitable character, not depending upon possession, as for instance partnership liens—liens upon property deposited for a special purpose (**218**), and this very right of the attorney against the fruits of a judgment—are recognized by the name of "liens;" and we have seen in how many cases liens without possession are enforced in equity. The judgment is yet more difficult to understand when it is considered that the case arose under the latter jurisdiction, and could not therefore be affected by the narrow meaning which the courts of law often attribute to the word "lien" (*q*).

(*o*) Shaw *v.* Neale, 20 Beav. 157; 6 H. L. Ca. 581.

(*p*) 6 H. L. Ca. 603.

(*q*) In Hough *v.* Edwards, 1 H. & N. 171, a claim by an attorney to a general lien against a judgment debt, attached under the garnishee clauses of the Common Law Procedure Act, 1854, was refused, because he could have no possession of the judgment; but this was a claim to a *general* lien which requires possession (**252**), and the judgment was not recovered by the attorney in the suit. In Baker *v.* St. Quentin, 12 M. & W. 441, Parke, B., doubted (and the doubt has often been quoted) if the

227. In consequence (it is said) of the above decision, it has been enacted (*r*), that in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter or proceeding in any court of justice, the court or judge before whom any such suit, matter or proceeding has been heard, or shall be depending, may declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter or proceeding. And such court or judge may make such orders for taxation of and for raising and payment of such costs, charges and expenses out of the said property as shall appear just and proper. And all conveyances and acts done, or which shall operate to defeat such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. Provided that no such order shall be made where the right to recover payment of such costs, charges and expenses is barred by any statute of limitations.

The Court of Chancery has refused to charge an estate, in respect of which a foreclosure decree has been made, with the costs of ejectments, or of any other proceedings other than those incurred in the foreclosure suit (*s*). A charge may be made under the act (*t*), not merely in favour of a solicitor against his client, but also in favour of the London solicitor, for costs due from the country solicitor, for whom he has acted as agent, though the balance of such costs be not ascertained; and an inquiry may be directed to ascertain their amount. A

word *lien* were correctly applied to the right of the attorney against the fruits of a judgment. There seems, however, to be no reason for the doubt beyond the narrow meaning which is sometimes given to the word "lien" by the courts of law.

(*r*) 23 & 24 Vict. c. 127, s. 28.

(*s*) Wilson *v.* Round, 10 Jur., N. S. 34.

(*t*) Tardrew *v.* Howell, 3 Gif. 381.

charging order will not be made where the suit was on behalf of an infant, but when he attains his full age it may be made as to the residue of the costs then remaining unpaid (*u*).

For the purposes of the act, a cause heard at Nisi Prius is considered as having been tried by the court in which it was brought, and the charging order will be made by a common law court for common law costs, though the property be in course of administration in chancery; provided the applicant do not come so late as to interfere with the distribution (*x*).

Except that it gives a security for costs against real estate recovered in a suit or action, this enactment appears to be of little value to the solicitor; for whereas his lien is an equitable right, which cannot be defeated by the client's assignment of the fund, or by any stop order obtained by the assignee (which equitable right remains unaffected by the act (*y*)), the assignment by the client to a bonâ fide purchaser for value without notice is not void against the statutory charge. Nor can that charge be obtained when the remedy for the costs is barred by the Statute of Limitations, by which neither the attorney's lien on a judgment (*z*) nor a possessory lien (*a*) is affected.

228. The lien being founded upon the equitable right of the solicitor, against those who have the benefit of the fund which has been produced by his exertions, it binds the assignees in bankruptcy of the client, whether the action was brought before the bankruptcy, or by the uncertificated bankrupt after it (*b*); and if money be recovered by an administratrix, it is bound by the lien, and she cannot controvert it by insisting upon applying the assets in a course of administration (*c*); nor can the benefit of an order for payment of costs to the client be released by him to the prejudice of the lien of his solicitor (*d*).

(*u*) Bonser *v.* Bradshaw, 9 Jur., N. S. 1048.

(*x*) Ex parte Seaman, 10 Jur., N. S. 592.

(*y*) Haymes *v.* Cooper, 33 Beav. 431; 10 Jur., N. S. 303.

(*z*) Higgins *v.* Scott, 2 B. & Ad. 413.

(*a*) Spears *v.* Hartley, 3 Esp. 81.

(*b*) Jones *v.* Turnbull, 2 M. & W. 601; Ex parte Bowden, 2 D. & C. 182.

(*c*) Turwin *v.* Gibson, 3 Atk. 720.

(*d*) Ex parte Bryant, 2 Rose, 237; 1 Mad. 49.

229. The right of the attorney or solicitor (*e*) entitled to the lien is, that the fund recovered shall not be paid to the client until the costs have been discharged. The right may be enforced by bill in equity, or protected by stop order, where the fund has been paid into court (*f*), or the solicitor may retain his costs out of the fund, if it be already in his hands (*g*). It may also be enforced by the order of a court of law, for payment of the costs by the person who becomes liable under the judgment (*h*). Where an order is made for payment of costs to the client, the solicitor is entitled to immediate payment out of the client's money in court, or out of the fruits of an execution in the hands of the sheriff, though the latter have notice to retain the fund, on the ground that the defendant intends to set aside the proceedings for irregularity (*i*).

230. This lien will not prevent the parties to a litigation from making a compromise, where the damages sought to be recovered are unliquidated (*k*), though the plaintiff's attorney have given notice of his claim; or even it seems where the action is for liquidated damages, unless it be shown that the arrangement was made collusively to deprive the attorney of his costs (*l*). This rule is followed even where the plaintiff sues in formâ pauperis (*m*). And the attorney, after the action has been bonâ fide settled without his intervention, or on his acceptance of an undertaking for the payment of his costs, cannot proceed with the suit for the mere purpose of recovering them (*n*).

Even if the person liable to pay the money should pay it to the client collusively, without regard to a notice (*o*) from the

(*e*) See Barker *v.* St. Quentin, 12 M. & W. 441; per Parke, B., Verity *v.* Wyld, 4 Dr. 427; Ex parte Games, 3 H. & C. 294.

(*f*) Sympson *v.* Prothero, 3 Jur., N. S. 711; Hobson *v.* Shearwood, 8 Beav. 486, and note there.

(*g*) Hanson *v.* Reece, 3 Jur., N. S. 1204.

(*h*) Ormerod *v.* Tate, 1 East, 464.

(*i*) Pounset *v.* Humphreys, C. P. C. 142; Griffin *v.* Eyles, 1 H. Bl. 122.

(*k*) Ex parte Hart, 1 B. & Ad. 660.

(*l*) Bransdon *v.* Allard, 5 Jur., N. S. 596; see Verity *v.* Wyld, 4 Dr. 427.

(*m*) Francis *v.* Webb, 7 C. B. 736.

(*n*) Chapman *v.* Haw, 1 Taunt. 340; Morse *v.* Cooke, 13 Price, 473.

(*o*) But if a person who holds a fund for those entitled states that he cannot attend to a notice unless prevented from paying it over by legal process, the

attorney not to do so, or should otherwise by collusion attempt to deprive the attorney of his costs, the latter has no right to proceed to execution in the suit contrary to the plaintiff's order, for the purpose of securing a fund out of which the costs may be paid (*p*), much less is he able to attain his object by means of execution against the person of the defendant; who, if he be already in the custody of the sheriff, may not be detained (*q*) in satisfaction of the lien after payment or release, whether collusive or otherwise, of the debt for which he was taken in execution, though the attorney have given notice to the client not to discharge the defendant without his consent.

The proper remedy of the attorney, in such a case, is to apply to the equitable jurisdiction of the court (whether of law or equity) in which the action or suit was brought, and which may make an order against both plaintiff and defendant, for repayment of the costs to the extent of the lien (*r*). Or the attorney may proceed to recover his costs against the person who has paid the money under the collusive arrangement (*s*); or if a security have been given for the amount, it may be ordered to be delivered to the attorney, that he may take his costs and hold the balance for the person entitled (*t*).

231. But the attorney must be able to show that everything has been rightly done, for otherwise, as for instance if he sued without authority, the court will give him no assistance (*u*). And he must earn his equitable remedy by doing whatever, under the circumstances, may be equitable on his part. Where therefore the debt was released to the defendant upon condition of his giving up to the plaintiff the pawn tickets of pledged property, the court refused to order the delivery of that

attorney must not rest upon his notice, but must take proceedings to secure the fund. (Townsend *v.* Reade, 4 L. J., N. S., Ch. 233.)

(*p*) Ex parte Games, 3 H. & C. 294.

(*q*) Martin *v.* Francis, 2 B. & Ald. 402; Marr *v.* Smith, 4 id. 466; Pyne *v.* Erle, 8 T. R. 407; Barker *v.* St. Quentin, 12 M. & W. 441; Langley *v.* Headland, 19 C. B., N. S. 42; 11 Jur., N. S. 431.

(*r*) See Welsh *v.* Hole, Dougl. 238; Ormerod *v.* Tate, 1 East, 464; Read *v.* Dupper, 8 T. R. 361; Barker *v.* St. Quentin, 12 M. & W. 441; White *v.* Pearce, 7 Hare, 276. The affidavit should show the amount claimed. (Davies *v.* Lowndes, 3 C. B. 823.)

(*s*) Swain *v.* Senate, 2 Bos. & P. N. R. 99.

(*t*) Gould *v.* Davis, 1 Cr. & J. 415.

(*u*) Abbott *v.* Rice, 3 Bing. 132.

property to the attorney after it had been redeemed by the plaintiff, unless the attorney would repay the plaintiff the redemption money (*x*).

While the sum agreed to be paid as a compromise is unpaid, the court, without otherwise disturbing the arrangment, will direct the defendant to pay the plaintiff's attorney so much of it as will satisfy the lien (*y*).

232. The lien will not prevent the interference of the court where a defendant is entitled to relief from the verdict against him on the ground of the claim of the plaintiff's attorney upon the verdict for costs, the lien being at an end where the client either by his own act or by the act of the law and without collusion is deprived of the means of further enforcing his claim against the opposite party (*z*).

233. In equity the client's right to set off whatever may be due from him to the opposite party against the fund recovered, is not affected by the lien, it being considered that the lien only binds that which is ultimately found due to the client (*a*); but this rule does not apply to the set-off of the costs of different suits in equity, and still less to the set-off of costs in equity against costs at law (*b*).

In consequence of a diversity in the practice of the different courts of law upon this point, it was ordered by one of the General Rules (*c*) that no set-off of damages or costs between parties should be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought. But interlocutory costs in the same suit awarded to the adverse party may be deducted.

234. Where judgments obtained in different actions, or on a single award under a reference of different actions, are sought to be set off against one another, the attorney's lien,

(*x*) Langley *v.* Headland, 19 C. B., N. S. 42.

(*y*) Lowndes *v.* Davies, 3 C. B. 808; Slater *v.* Mayor of Sunderland, 33 L.J., N. S., Exch. 37.

(*z*) Symons *v.* Blake, 2 Cr., M. & R. 416.

(*a*) Per Lord Eldon, Taylor *v.* Popham, 15 Ves. 72; Bawtree *v.* Watson, 2 Keen, 713; see Ex parte Rhodes, 15 Ves. 539. But see Bailey *v.* Birchall, 2 H. & M. 371.

(*b*) Wright *v.* Mudie, 1 Sim. & S. 266; Collett *v.* Preston, 15 Beav. 458.

(*c*) No. 63, Hil. T. 1853, following No. 93, Hil. T. 1832. For the practice under this rule, see Archbold's Practice by Prentice, ed. 12, 140—142.

which does not extend beyond the costs in the particular cause, is protected by the general rule from being prejudiced by the set-off (*d*). And to such cases only the rule applies, not to cases of set-off between parties to the same suit. Therefore, where in an action against two, they severed, and appeared by different counsel and attornies, and the plaintiff succeeded against one, but failed against the other, the costs of the latter defendant were ordered to be set off against the damages and costs recovered by the plaintiff against the former, though the effect was to defeat the lien of the plaintiff's attorney (*e*).

Of Maritime Liens.

235. The maritime law, like the civil law upon which it is founded, admits the validity of a lien without possession (*f*). By it, in addition to his personal remedy against the owner (*g*), the mariner has a lien upon the ship for his wages, and the salvors for the reward of their labours; and the like privilege is given to demands for pilotage and towage, upon the equitable principle that the owner of the ship shall not profit by the exertions of those by whom his property has been saved or made profitable without making a due recompense (*h*).

236. But, independently of the statute law, neither the master of the ship for his wages, nor he, nor any other creditor (unless a possessory lien can be established), in respect of advances for the fitting, repairs or other uses or necessities of the ship, or for premiums paid by the master for procuring cargo, are entitled by the law of England to any lien upon the ship (*i*); although such liens were and are recognized by

(*d*) Stephens *v.* Weston, 3 B. & C. 535; Watson *v.* Maskell, 1 Bing. N. C. 366; Domett *v.* Helyer, 2 Dow, P. C. 540.

(*e*) Lees *v.* Reffitt, 3 Ad. & El. 707, following George *v.* Elston, 1 Bing. N. C. 513.

(*f*) The Bold Buccleugh, 7 Moo. P. C. 267; Tatham, app. Andrée, resp., 1 Moo. P. C., N. S. 386; 9 Jur., N. S. 1019.

(*g*) Duncan *v.* Benson, 1 Exch. 537; 3 id. 644.

(*h*) The Dowthorpe, 2 W. Rob. 73; The Louisa Bertha, 14 Jur. 1007; The Linda Flor, 4 Jur., N. S. 171.

(*i*) Wilkins *v.* Carmichael, Dougl. 97; Buxton *v.* Snee, 1 Ves. 154; Watkinson *v.* Barnardiston, 2 P. W. 367; Smith *v.* Plummer, 1 B. & Ald. 575; Hussey *v.* Christie, 13 Ves. 594; 9 East, 426; The Neptune, 3 Knapp, 94; The Pacific, 10 Jur., N. S. 1110.

the civil law (*k*), and by the laws of those countries which have adopted it.

Yet even by our law, if the master, as the owner's agent, had made a special contract for the use of the ship, in a manner which necessitated an outlay upon it, the matter might be treated as one between principal and agent (**201**); and the owner and his mortgagees, either admitting the agency or not repudiating the contract, would not be allowed to take the benefit without bearing the burthen. The master, therefore, in such a case has been held entitled to a lien on the ship and on the money produced by the contract for his outlay and indemnity against all liability incurred in the transaction (*l*).

237. And by the act 7 & 8 Vict. c. 112, s. 16, and the yet larger provisions in favour of the master contained in the Merchant Shipping Act, 1854, s. 191, every master of a ship has, so far as the case permits, the same rights, liens and remedies for the recovery of his wages, which by the latter statute, or by any law or custom, any seaman not being a master has for the recovery of his wages. This provision relates only to claims for the master's wages against the owner and his property, and does not alter the relation between master and seaman (*m*); and as both masters and seamen were still left without any remedy in the Admiralty Court for wages, when the wages were due under a special contract, the Admiralty Court Act, 1861 (*n*), gave to the High Court of Admiralty jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether due under a special contract or otherwise (*o*), and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements (*p*) made by him on account of the ship; with a proviso that the plaintiff shall not

(*k*) Abbott on Shipping, 142, 149; Colquhoun, Sum. Rom. C. L., § 1480; Stainbank *v.* Fenning, 15 Jur. 1082; The Laurel, 11 Jur., N. S. 46 (Batavia).

(*l*) Bristow *v.* Whitmore, 9 H. L. C. 391; 1 Johns. 96; 6 Jur., N. S. 29; 8 id. 291.

(*m*) The Salacia, 9 Jur., N. S. 27.

(*n*) 24 Vict. c. 10, s. 10.

(*o*) By the act of 1854, s. 191.

(*p*) The word "disbursements" does not include mere liabilities for wages or necessaries. (The Chieftain, 32 L. J., N. S., P. M. & A. 106; The Edwin, 33 id. 197.)

be entitled to costs where he shall not recover £50, unless the judge shall certify that the cause was a fit one to be tried in the court.

The Court of Admiralty, therefore, having before the act of 1861 (*q*) jurisdiction to deal with these matters in certain cases, viz., with master's wages where not fixed by special contract, and with all unsettled accounts, including therefore disbursements by the master, where a set-off or counterclaim was set up to his claim for wages (*r*), and recognizing in those cases the existence of a maritime lien, is considered to be empowered by the act of 1861 to enforce a lien in like cases arising under the extended jurisdiction created by the act of 1861; but the lien is held not to arise merely by virtue of the statutory power to enforce claims by proceedings in rem (*s*). The master's lien for services and disbursements is not affected by the circumstance that the possession of the vessel at the time when they were given and made was fraudulent (*t*) (**301**).

238. The act of 1861 also gives the Admiralty Court jurisdiction over claims for the building, equipping or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the court (*u*); over claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner (*x*) of the ship is [was?] domiciled in England or Wales, but with a proviso that if the plaintiff do not recover £20 he shall have no right to costs, charges or expenses incurred in the cause, unless the judge shall certify that the cause was a fit one to be tried in the court (*y*).

(*q*) By the act of 1854, s. 191.

(*r*) The mortgagee, like the owner, was bound to go into the account if he claimed deductions from the wages. (The Caledonia, 2 Jur., N. S. 48.)

(*s*) The Mary Ann, L. R., 1 Adm. 8; 35 L. J., Adm. 6.

(*t*) The Edwin, 33 L. J., P. M. & A. 197.

(*u*) Sect. 4.

(*x*) *I. e.*, owner or part owner when the supplies were furnished. (The Ella A. Clark, 9 Jur., N. S. 312.)

(*y*) Sect. 5. This only applies to British and colonial ships, and does not supersede s. 6 of 3 & 4 Vict. c. 65, s. 6, which gives jurisdiction in cases of supplies to foreign ships. (The Ella A. Clark, supra.)

239. The jurisdiction is also given over any claim by the owner, consignee or assignee of any bill of lading of any goods carried into any port in England or Wales, in any ship, for damage to the goods or any part thereof by the negligence, misconduct or breach of duty or contract on the part of the owner, master or crew of the ship; unless it be shown that at the institution of the cause any owner or part owner of the ship is domiciled in England or Wales; with a like proviso as to costs as in the case of the claim for necessaries (*z*).

The court also has jurisdiction over any claim for damage done by any ship (*a*).

Tried by the rule applied to the master's wages and disbursements in the case of *The Mary Ann* cited above, it appears that there is a maritime lien under the act of 1861 for seamen's wages, though not fixed by special contract, and for damage to the ship; but not for building, equipping or repairing a ship, or for necessaries supplied to her, or for damage to the goods under section 6, for which there is only a statutory remedy against the res (*b*).

The act of 1861 confers no jurisdiction over claims for repairs and necessaries done and supplied to a foreign ship in a foreign port (*c*).

240. The consignee of the ship and cargo has a lien on the proceeds of the cargo for what he has laid out to enable the ship to proceed on her voyage. And even one who is not a consignee, but has made such an advance bonâ fide, and with the sanction of the owner of the cargo, who thereby obtains the benefit of the advance, is entitled to a lien on the proceeds of the cargo if he can arrest them before they come to the hands of the shipper, subject to proper deductions in favour of the consignee, and the lien will extend to all loss and damage arising from a breach of contract by the consignor to consign the cargo to him, but not to any commission or profit which might have been earned in respect of the consignment if it had been so made (*d*).

(*z*) Sect. 6.

(*a*) Sect. 7.

(*b*) See the Gustaf, 6 L. T., N. S. 660; The Pacific, 2 Bro. & L. 243; The Troubadour, L. R., 1 Ad. 302.

(*c*) The India, 9 Jur., N. S. 417.

(*d*) Young *v.* Neill, 32 Beav. 529; 9 Jur., N. S. 976.

241. The right to general average contribution after adjustment gives the owner of the cargo no lien under the maritime law, which does not enforce such a lien, unless being fortified by possession of the cargo it can be maintained as a common law lien (*e*) (**313**).

242. There is also a lien upon a ship for the amount of the damage, which wrongfully, that is, by the fault of those in charge of it, does injury to another ship (*f*). Independently of the statute law the ship owner was also personally liable to the whole amount of such damage. But following the example set by several foreign nations in narrowing this liability, it has been enacted (*g*) that the owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say,

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship;

(2.) Where any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship;

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;

(4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise or other thing whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things to an aggregate amount exceeding £15 for each ton of their ship's tonnage, nor

(*e*) The North Star, 1 Lush. 45; Cleary *v.* M'Andrew, 2 Moo. P. C., N. S. 216.

(*f*) Bold Buccleugh, 7 Moo. P. C. 267; The Europa, 9 Jur., N. S. 699; 2 Moo. P. C., N. S. 1.

(*g*) Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), s. 54; substituting the present provisions for those of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 504.

in respect of loss or damage to ships, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage, such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine room.

243. This statute being expressly made applicable to any ship, whether British or foreign, follows a British ship into all seas, and applies to all foreign ships in British waters; but will not avail British ships in foreign countries, nor, it is said, foreign ships before British courts, in case of damage on the high seas beyond the jurisdiction of the British legislature (*h*).

Under the act of 1854, where the damage was caused by a British to a foreign ship within three miles of the British coast, the former was (*i*) entitled to the benefit of the act. But a foreigner could not be relieved in respect of damage done on the high seas to a British ship (*k*), nor it seems could a British ship which had damaged a foreigner; nor could one foreigner claim the benefit of the act against another (*l*),

244. In accordance with the construction (*m*) put upon one of the former statutes for limiting the shipowner's liability, the value of the ship will under ordinary circumstances be ascertained by valuation and appraisement, and not by making a deduction from the prime cost proportioned to the age of the ship; and the value is taken to be the price for which the ship might have been sold, immediately before the occurrence of the damage (*n*): not reducible by the costs or expenses of the sale (*o*), nor by the value of the injury which has been received

(*h*) Maclach. Shipping, sup. 36.

(*i*) Iron Screw Collier Co. *v.* Schurmann, 1 Jo. & H. 180.

(*k*) The Wild Ranger, 9 Jur., N. S. 134.

(*l*) Cope *v.* Doherty, 4 K. & J. 367; 2 De G. & J. 614.

(*m*) Dobree *v.* Schroder, 2 M. & C. 489; 53 Geo. 3, c. 159.

(*n*) Wilson *v.* Dickson, 2 B. & Ald. 2; Cannan *v.* Meaburn, 1 Bing. 465; African Steam Ship Co. *v.* Swanzy, 2 K. & J. 660.

(*o*) Leycester *v.* Logan, 4 K. & J. 725.

in the collision by the offending ship herself (*p*), the owner of which is still liable, though she founders in consequence of the accident (*q*). His liability however is not increased by reason that bail has been given for the ship beyond her ascertained value (*r*).

245. In the valuation of the ship must be included the value of her appurtenances, such as chronometers (*s*) (**39**), and whatever is on board for the object of the voyage and adventure on which she is engaged, whether it be warfare, conveyance of passengers or goods, or fishery; the nature of which last pursuit (recompensed as it is by cargo and not by freight), brings within the rule the stores and implements provided for capturing the fish, and for bringing home the produce (*t*).

246. Under the act of 1854, which measured the liability of the owner by the value of the ship and freight, the freight included (*u*) the value of the carriage of any goods or merchandise belonging to the owners of the ship, passage money, and the hire due or to grow due under any contract; except only such hire, in the case of a ship hired for time, as might not begin to be earned till the expiration of six months after the loss or damage.

Under a former statute (*x*), the words of which were "the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage," it was held (*y*), that freight for that voyage, whether paid in advance or not, was included: but only (*z*) that which under the circumstances was or might have been earned by the particular voyage, and not all which might have been earned if the ship had met with no disaster.

(*p*) The Mary Caroline, 3 W. Rob. 101.

(*q*) Brown *v.* Wilkinson, 15 M. & W. 391.

(*r*) The Richmond, 3 Hag. A. R. 431; The Mary Caroline, supra.

(*s*) Maclach. Shipp. 287, sc., because they pass by assignment of ship, her tackle and appurtenances. (Langton *v.* Horton, 6 Jur. 910.)

(*t*) The Dundee, 1 Hag. A. R. 109; *S. C.*, Gale *v.* Laurie, 5 B. & C. 156.

(*u*) Merchant Shipping Act, 1854, s. 505.

(*x*) 53 Geo. 3, c. 159, repealed by the Merchant Shipping Repeal Act, 1854.

(*y*) Wilson *v.* Dickson, 2 B. & Ald. 2.

(*z*) Cannan *v.* Meaburn, 1 Bing. 465.

247. The construction of the 504th section of the act of 1854, as regarded the extent of the liability, was that in cases of loss of life or personal injury it extended to the sum of £15 per registered ton (*a*); and the valuation was made on the same principle, where damage had happened both to persons and goods, for the purpose of assessing the compensation for the former: but where these demands were settled, the ship was only estimated at her actual value for the purpose of calculating compensation in respect of the damage to the goods notwithstanding the occurrence of the personal injury. In cases where both claims arose the owners of the goods, upon the principle of marshalling, were entitled to have all demands in respect of the personal injury satisfied as far as possible out of the excess, if any, of the fund available for them, beyond the actual value which alone would be available for the owners of the goods (*b*).

248. The liability arises in respect of every loss of life, personal injury, or loss of or damage to goods arising on distinct occasions, to the same extent as if no other loss, injury or damage had arisen (*c*).

249. The lien can only be enforced in the Court of Admiralty, which acts in rem (*d*), but the benefit of the statute may be obtained (*e*) by the ship owner, against whom claims are made or apprehended in respect of loss of life, personal injury or damage, by proceedings in the Court of Chancery in England or Ireland, the Court of Session in Scotland, or any competent court in a British possession, to determine the amount of the liability and make a rateable distribution among the claimants; and for this purpose the courts are empowered to stop all actions and suits pending in any other courts in relation to the same subject matter, and to regulate the proceedings as to the parties, the exclusion of claimants who do not come within a certain time, the requiring security from the owner, and the payment of costs.

(*a*) Glaholm *v.* Barker, 11 Jur., N. S. 434.

(*b*) Nixon *v.* Roberts, 1 Jo. & H. 739.

(*c*) Merch. Ship. Act, 1854, s. 506.

(*d*) Bold Buccleugh, 7 Moo. P. C. 267.

(*e*) Merchant Shipping Act, 1854, s. 514.

250. The provisions of the act apply, though the adverse claimant have obtained a definitive judgment of the Court of Admiralty condemning the ship. The Court of Chancery, however, cannot prevent a person who has obtained such a judgment from selling the ship and retaining out of the proceeds such costs as he may be entitled to under the order of the Court of Admiralty; but will prevent him from obtaining more than his rateable share of the proceeds of the sale, and for that purpose will order (*f*) payment of the balance of the proceeds into court.

251. The lien attaches upon the occurrence of the damage, and is not discharged by the mere sale of the ship, but may be enforced against it in the hands of a purchaser without notice, provided the proceedings be bonâ fide and taken with reasonable diligence (*g*).

Chapter II. Part 3.—Of Liens which depend upon Possession, and herein of General and Specific Liens.

252. *Of the Nature of Possessory Liens.*
260. *Of general Liens: and herein*
273. *Of the Lien of the Attorney and Solicitor upon Documents and other Chattels of his Client.*
296. *Of specific Liens*—(1) *In respect of Labour upon the Chattel.*
300. (2) *In respect of Acts done under a legal Obligation.*
321. *Of the Lien of the Vendor of Chattels.*

Of the Nature of Possessory Liens.

252. Possessory liens entitle persons, who are in possession of chattels belonging to their debtors, to retain them as a security.

I. For the payment of debts due to the holder of the chattel, and which have been incurred—

1. In the course of trade.

(*f*) Leycester *v.* Logan, 3 K. & J. 446.

(*g*) The Bold Buccleugh, 7 Moo. P. C. 267; The Europa, 9 Jur., N. S. 699; 2 Moo. P. C., N. S. 1.

2. For labour bestowed upon the chattel and by which its value has been increased.
3. For services or supplies furnished in discharge of the obligation imposed by the law upon certain trades.

II. For the price of chattels sold.

Such liens are either *general* or *specific*; the latter arising by common law, by usage, or by agreement (6), and enabling the holder of the chattel to retain it only until payment of the particular debt which is due in respect of the chattel; the former extending to any balance which may be due from the owner of the chattel to the person who holds it, and arising only by usage or agreement in favour of persons who carry on some particular kinds of business.

Before noticing in detail the different cases in which general and specific liens arise, it is necessary to point out certain rules by which they are generally affected, and to explain the nature and incidents of the possession which is essential to their validity, and by the loss or abandonment of which they are destroyed (**1480-1489**).

253. The property upon which the lien is claimed must belong to the person against whom it is claimed in the same character in which the debt is owing. A banking firm therefore cannot retain a balance due to them from one of the partners, to answer a debt due to them from another firm of which that partner is a member (*h*). And if a member of a firm give a security upon property to his bankers, for money lent to him upon his separate credit, the bankers have no lien on the security for the general balance due from the firm when the firm becomes entitled to the property (*i*).

254. Possession of the property is as essential to the validity of a general as of a special lien. So that a vendor may stop goods in transitu, if they have not come to the possession of the consignee, though in consideration of the consignment the latter have accepted bills drawn by the consignor, and have paid freight or other charges on the goods (*k*). The

(*h*) Watts *v.* Christie, 11 Beav. 546; see Ryall *v.* Rolle, 1 Atk. 165, 184; 1 1 Ves. 348, 373.

(*i*) Ex parte M'Kenna, 7 Jur., N. S. 588.

(*k*) Kinloch *v.* Craig, 3 T. R. 123, 783; 4 Bro. P. C. '47.

agreement under which he has done so is merely executory and the subject of an action. The result will be the same if the consignor, in breach of his agreement, consign the goods to another person, who transmits them to him who was originally named as consignee, as the agent of the actual consignee (*l*). But it seems that if the goods come to the consignee's hands, the lien will hold in respect of payments and acceptances made before notice of the consignor's death or insolvency, though the goods be not received till after that event (*m*).

255. To sustain a possessory lien the property must have come to the hands of the claimant in the ordinary course of dealing, and not for any special purpose, or subject to any special legal consequence which may be inconsistent with the claim. No lien will arise where the possession was obtained by fraud, misrepresentation or other wrongful act (*n*); not even to secure payments made in respect of the goods by the person who has so obtained them (*o*), nor where the goods were deposited for safe custody only and without a special contract for a lien (*p*), or for a special purpose or subject to a direction to pay the proceeds of the sale to a particular account (*p*). In the case of a banker no lien will attach upon exchequer bills delivered to him for the special purpose of receiving the interest on them and exchanging them for new bills (*q*), though it be usual for bankers to perform that duty for their customers; nor upon securities casually left with a banker (*r*); and the mere possession of goods by a factor or other agent will confer no lien if by the terms of the contract, by his own permission, or by legal construction, they evidently remain under the dominion of the principal. Therefore if possession of the goods be delivered to an agent, his possession is the possession of the

(*l*) Bruce *v.* Wait, 3 M. & W. 15.

(*m*) Hammonds *v.* Barclay, 2 East, 226; but the consignor's executors confirmed the consignment.

(*n*) Madden *v.* Kempster, 1 Camp. 12; Griffiths *v.* Hyde, Selw. N. P. 1390. ed. 11; Taylor *v.* Robinson, 2 Moo. 730; Ex parte Oursell, Ambl. 297.

(*o*) Lempriere *v.* Pasley, 2 T. R. 485;

(*p*) Muir *v.* Fleming, D. & R., N. P. C. 29; see Hartop *v.* Hoare, 3 Atk. 44—47; Walker *v.* Birch, 6 T. R. 258; In re Cullen, 27 Beav. 51.

(*p*) Holroyd *v.* Griffiths, 3 Dr. 428.

(*q*) Brandão *v.* Barnett, 12 Cl. & F. 787.

(*r*) Lucas *v.* Dorrien, 7 Taunt. 278.

principal; and though he may have contracted for a lien upon them, his lien will not avail against the right of the principal's assignees in bankruptcy claiming under the reputed ownership of the bankrupt, if before the bankruptcy the agent have not so disposed of them as to prevent that claim (*s*). And if goods be purchased by a factor, and be left by agreement in the hands of the vendor, in whose hands the principal exercises acts of dominion over them, the possession is clearly in him, and the factor cannot acquire a lien by taking possession after the bankruptcy of the principal (*t*). Again, possession delivered by a carrier, under the order of the shipper given after his bankruptcy, to a factor who has no right by special agreement or by possession of the bill of lading or otherwise to require delivery, will give the factor no lien though the goods were shipped on his account, and even though he have accepted bills on the faith of the consignment (*u*). And as to the effect of a contract, if factors sign a special receipt for goods delivered to them for sale, by which they undertake to pay the proceeds to the principal or his order, the goods if not sold must be returned to the principal (*x*).

256. Neither the possession which is necessary to support (*y*), nor that which is sufficient to defeat (*z*) a lien, need be of a corporal kind (**1519**). The principal may have a lien by virtue of the possession of his agent (*a*); and the lien will arise if the goods have been received, and an act of ownership exercised, as by paying for warehouse room or taking samples, measuring and marking the goods or expending money in labour on them. But the possession is not considered to be vested in a factor by the mere payment by him of freight (*b*).

257. The possession must be continuous (**1480, 1481**); there can, therefore, be no lien where by the nature of the contract between the owner of the property and the holder

(*s*) Haggard *v.* Mackenzie, 25 Beav. 493; 4 Jur., N. S. 1008.

(*t*) Taylor *v.* Robinson, 2 Moore, 730.

(*u*) Nichols *v.* Clent, 3 Price, 547.

(*x*) Walker *v.* Birch, 6 T. R. 258.

(*y*) Bull *v.* Faulkner, 2 De G. & S. 772.

(*z*) Wright *v.* Lawes, 4 Esp. 82; Cooper *v.* Bill, 3 H. & C. 722; 34 L. J., Ex. 161.

(*a*) See Belcher *v.* Oldfield, 6 Bing. N. C. 102; 8 Scott, 221.

(*b*) Kinloch *v.* Craig, 3 T. R. 123, 783.

it is received subject to the owner's right of disposition. Hence the agister of cattle, not having entire possession of them, cannot retain them (*b*) in respect of the agistment; nor the stable keeper horses left in his charge, for their keep, or for labour or money bestowed upon them, though at the owner's request (*c*), for he takes them upon the terms that the owner is to have the control and right of possession and use at his pleasure, which is inconsistent with the nature of a lien. This reason, however, will not affect the lien of an innkeeper, to whose stable a horse is brought by a guest, and occasionally removed by him for his use or pleasure with the intention of returning it; because the original contract under which it was left is presumed to continue unless there is evidence that it has been changed (*d*) (**302**).

258. It was formerly considered that there could be no lien where a special contract was made for a reasonable or absolutely fixed price for the work or other consideration in respect of which the lien was claimed (*e*). But it has long been established, that a lien may arise under such a special agreement, as well as where the contract to pay a reasonable price is only implied, provided the special agreement contain no stipulation which is inconsistent with the nature of a lien (*f*). Such a stipulation is found in the contract made with a livery stable keeper for the care of a horse, which is to be delivered to the owner for his use whenever he may require it. So it is where chattels are sold for payment at a future time. "If I buy of you a horse for 20*s*.," says Haydon, J., "you retain the horse till you be paid the 20*s*.; but if I am to pay you at Michaelmas next ensuing, you may not detain the horse until you be paid" (*g*). Because on the

(*b*) Chapman *v.* Allen, Cro. Car. 271; Jackson *v.* Cummins, 5 M. & W. 342.

(*c*) Chapman *v.* Allen, Cro. Car. 271; Wallace *v.* Woodgate, 1 Car. & P. 575; Bevan *v.* Waters, 3 id. 520; Judson *v.* Etheridge, 1 C. & M. 743; Orchard *v.* Rackstraw, 9 C. B. 698.

(*d*) Allen *v.* Smith, 6 L. T., N. S. 459.

(*e*) See Brenen *v.* Carrint, Bac. Abr. Trover, E.

(*f*) Chase *v.* Westmore, 5 Mau. & S. 180; Crawshay *v.* Homfray, 4 B. & Ald. 50; Scarfe *v.* Morgan, 4 M. & W. 270; per Gibbs, C. J., in Hutton *v.* Bragg, 7 Taunt. 13; see Jones *v.* Peppercorne, Joh. 430.

(*g*) Hostiler, acc. sur le cas, cited Year Book, 5 Edw. 4, E. T., No. 20.

sale of a chattel, where no day of payment is fixed, payment of the price and delivery are concurrent acts; but where a future day is fixed for payment, the vendor not keeping possession can have no lien.

259. Where the holder of property claims to hold it as agent for another, claiming a lien, he must be able to show an authority for doing so; if he cannot, the other will lose his lien for want of possession; and the actual holder having no lien will be responsible, if after demand he part with the goods to the creditor. He cannot detain them by virtue of a mere authority from the latter to receive payment of the debt (*h*).

Of General Liens.

260. Specific liens both arise and, as between debtor and creditor, are favoured by law; but liens for general balances are founded upon contract or usage, and are regarded with jealousy both by courts of law and equity (*i*). In certain trades, in which it is usual for advances to be made by the agent to the principal, the right has been long established and is admitted without further proof (*k*). But in no others is it allowed without evidence of general usage or course of dealing, or of special agreement, to which a general resolution by persons claiming the lien, that they will only receive the goods of those who deal with them subject to the lien, is equivalent as against persons who have notice of the resolution; at least in those cases in which it is optional with the person insisting upon the lien to receive the goods, and not compulsory as in the case of an innkeeper (*l*).

261. Nor in those cases in which this form of lien is judicially recognized is it sufficient that the claimant follows the trade of which the lien is admitted to be a privilege. It is also necessary that in the very transaction out of which the

(*h*) Ex parte Grove, 3 Bing., N. C. 304.

(*i*) Per Best, C. J., in Jacobs *v.* Latour, 5 Bing. 130; Scarfe *v.* Morgan, 4 M. & W. 270; Rushforth *v.* Hadfield, 6 East, 519; Gladstone *v.* Birley, 2 Mer. 401.

(*k*) Bock *v.* Gorrissen, 7 Jur., N. S. 81; 2 De G., F. & J. 434.

(*l*) Kirkman *v.* Shawcross, 6 T. R. 14.

claim arises he shall have acted in the favoured character. So that if a person, who acts both as a factor and an insurance broker, effects a policy for a firm with which he has had transactions in both characters, and the evidence shows that he effected it as an insurance broker, he cannot claim for a general balance due to him as a factor (*m*). And the general lien of a factor does not extend to a debt for the purchase-money of goods sold by him to the employer before the employment as factor (*n*), because the demand did not arise out of a course of dealing in that relation.

262. The goods upon which the lien is claimed must also be within the terms of the agreement, construed according to the general law concerning liens. Where it was agreed that all goods "on hand" should be subject to a lien for a general balance, it was held that goods deposited with the claimant to be used by *the owner* in the process of manufacture were not subject to the lien; which was confined to those upon which the labour of the claimant was employed (*o*).

263. The general lien will cover a debt, the direct remedy for which has been barred by the Statute of Limitations (*p*).

264. The rights of strangers cannot be affected by a general lien (*q*). A warehouse keeper therefore cannot claim a lien on goods housed in his warehouse for and in the name of the merchants or other persons by whom the warehouse keeper is employed, for balances due from the former to the latter; for by such a custom the goods of foreign merchants would become liable to the private debts of the factor, previously incurred, in respect of goods of other persons, and to an unlimited extent (*r*). The like has been held in the case of a carrier as regards a claim for a lien against the true owner of the goods, for the general balance due from the factor to whom the goods were consigned for sale (*s*). And for the same reason a wharfinger cannot retain for a general

(*m*) Dixon *v.* Stansfield, 10 C. B. 398.

(*n*) Houghton *v.* Matthews, 3 B. & P. 485.

(*o*) Cumpston *v.* Haigh, 2 Bing. N. C. 449.

(*p*) Speers *v.* Hartley, 3 Esp. 81.

(*q*) Oppenheim *v.* Russell, 3 Bos. & P. 42; Wright *v.* Snell, 5 B. & Ald. 350.

(*r*) Leuckhart *v.* Cooper, 3 Bing. N. C. 99.

(*s*) Wright *v.* Snell, 5 B. & Ald. 350.

lien against one who was a purchaser of the goods, where the contract for sale was rescinded before they arrived, though no notice of that fact were given to the wharfinger (*t*).

And if a lien have once attached, even a verbal notice of the cesser of interest of the owner of the property will prevent its extension against him. The lien of a wharfinger was therefore held to be limited to charges incurred in respect of goods prior to the date of a verbal notice of their sale: though no delivery order had been served (*u*).

265. Liens for general balances are generally admitted, without further evidence of usage, to belong to those who carry on the business of a factor, wharfinger, insurance or other broker, banker, solicitor, packer or calico printer (*x*). In some other trades, the benefit of the lien is obtained, or attempted to be obtained, by fixing the employer with notice that the claimants will only transact business on the terms of a general lien; but the right to the general lien independent of such notice and of evidence of usage has been set up and has failed for want of sufficient evidence, in the cases of the carrier, the fuller, the dyer, and the miller; and these, like other workmen, the nature of whose business does not include the advance of money to their employers, have only by law a lien for the price of their labour upon the particular chattel of which it was the subject (*y*), and in the case of the carrier

(*t*) Richardson *v.* Goss, 3 B. & P. 119.

(*u*) Barry *v.* Longmore, 12 A. & E. 639.

(*x*) *The Packer:* Ex parte Deeze, 1 Atk. 228, per Lord Mansfield, in Green *v.* Farmer, 4 Bur. 2222. *The Calico Printer's* lien appears to be only for money due to him in the course of his business, and not for money lent or any collateral matter. (Webb *v.* Fox, Peake's Add. Cas. 167; Ex parte Andrews, Cooke's Bank. Law, 423, ed. 8; Weldon *v.* Gould, 3 Esp. 268.)

(*y*) *The Carrier:* Rushforth *v.* Hadfield, 6 East, 519; 7 id. 224; Wright *v.* Snell, 5 B. & Ald. 350; but the usage seems to have been established in Aspinell *v.* Pickford, 3 Bos. & P. 44, note. Unsuccessful attempts were made by carriers, where the custom was for the consignor to pay the carriage, to retain the goods for a general balance as against the consignee (Butler *v.* Woolcot, 2 Bos. & P. N. R. 64); and to retain for the balance of account between the consignee and the carrier, so as to affect the right of the consignor to stop in transitu. Lord Alvanley thought that even an agreement for such a right should not be allowed. (Oppenheim *v.* Russell, 3 Bos. & P. 42.) *The Fuller:* Rose *v.* Hart, 8 Taunt. 499. *The Dyer:* Green *v.* Farmer, 4 Bur. 2220; Bennett *v.* Johnson, 3 Dougl. 387; Close *v.* Waterhouse, 6 East,

at least the general lien, so far as it can be made out by evidence of usage, is by no means favoured in law.

266. A factor, to whom goods are consigned or sent with authority to sell in his own name, has a lien on the goods during his possession of them, and, when they are sold, upon the purchase-money, as a security for the general balance due to him from his principal (*z*), including such advances as he may have made, and such liabilities as he may have incurred, on the principal's account in the course of the business (*a*). If he become possessed of the goods before the principal's bankruptcy, and is selling them at that time, he may retain the purchase-money in payment of his general lien, though it be not received till after the bankruptcy (*b*); and if the purchaser be indebted to the factor, a settlement of accounts between the purchaser and the factor, or his assignees, will bind the principal (*c*).

Where factors at the request of the principal, and after his bankruptcy at the request of his assignees, delayed the sale of goods in their hands upon which they had a lien, they were allowed to retain out of the proceeds of the sale interest on the debt accruing after the bankruptcy, notwithstanding the rule in bankruptcy that interest stops at the date of the fiat (*d*).

267. The regulations made by the Factors' Acts concerning pledges and liens will be noticed hereafter (**441**). A wharfinger has a lien, resembling that of a factor, upon the goods in his possession for the general balance due to him for freight and wharfage (*e*); but claims for warehouse room and labourage depend upon evidence of undisputed

523, note; notwithstanding Savill *v.* Barchard, 4 Esp. 53. But per Gibbs, J. the custom had been proved by Mansfield, C. J., Lord Ashburton (Dunning) and himself, in the teeth of Green *v.* Farmer, in which there was no evidence of it, and it was decided that no such custom existed. 5 Taunt. 60. *The Miller:* Ex parte Ockenden, 1 Atk. 235.

(*z*) Per Lord Mansfield, in Godin *v.* London Assurance Co., 1 Bur. 490; Baring *v.* Currie, 2 B. & Ald. 137.

(*a*) Drinkwater *v.* Goodwin, 1 Cowp. 251.

(*b*) Robson *v.* Kemp, 4 Esp. 236.

(*c*) Hudson *v.* Granger, 5 B. & Ald. 27.

(*d*) Ex parte Kensington, 1 Dea. 58.

(*e*) Naylor *v.* Mangles, 1 Esp. 109; The King *v.* Humphrey, M'Clel. & Y. 188.

usage; and if the right be disputed where the wharfinger's business is carried on, he can only claim under special agreement, or after previous notice to the customer of the terms upon which the business is conducted (*f*).

268. A broker, who merely sells on account of his principals, has not like a factor the possession which is necessary to give him a lien. If he sell, and the goods are delivered to him for the use of his employers, his possession is theirs; and if he have paid money on their account without direction from or notice to them, he cannot claim a lien for the outlay (*g*). But if a broker advance money and give acceptances on the credit of goods lodged in his hands by consignees, the owner cannot claim them without both paying his advances and indemnifying him against the outstanding bills, in respect of which the mere counter acceptances of the owner will not be sufficient indemnity (*h*). And if he accept bills for merchants already indebted to him on a running account, on the merchants undertaking to assign him a cargo of which they are consignees, he has a lien on the cargo for the general balance due to him from the merchants (*i*).

Insurance brokers have a lien for their general balances, both by the custom of London (*k*) and by general usage (*l*).

269. A broker who effects a policy by the direction of an agent (*m*), without notice that he is not the principal, has a lien as against the real principal, and may apply in satisfaction of that balance money received on the policy as well before as after notice of the right of the latter, because the broker gave credit to his immediate employer as the real owner of the goods. And the burthen of showing that the broker had notice of the agency lies on the real principal. For the same

(*f*) Holderness *v.* Collinson, 1 M. & R. 55; 7 B. & C. 212.

(*g*) See Baring *v.* Currie, 2 B. & Ald. 137; Gurney *v.* Sharp, 4 Taunt. 242.

(*h*) Pultency *v.* Keymer, 3 Esp. 182.

(*i*) Ex parte Barber, 3 M., D. & De G. 174.

(*k*) Hewison *v.* Guthrie, 2 Bing. N. C. 755.

(*l*) Levy *v.* Barnard, 2 J. B. Moore, 34; Whitehead *v.* Vaughan, Cooke's Bank. Law, 566, ed. 5. But as to the custom of London, see per Tindal, C. J., in Hewison *v.* Guthrie, 2 Bing. N. C. 755; and see Ex parte Bosanquet, De G. 432; Power *v.* Butcher, 5 Man. & R. 327.

(*m*) Mann *v.* Forrester, 4 Camp. 60; Westwood *v.* Bell, id. 349.

reason, a broker who buys goods under the direction of an agent, without notice of the agency, has a lien upon them as against the real principal for the purchase-money (*n*). And a purchaser who buys from a factor, without notice that he is so, has a lien for his general balance due from the agent (*o*).

Where the person by whose direction a policy is effected discovers the fact that he is an agent, the broker has no lien for his general balance (*p*) against the agent, because it is clear that he cannot pledge his principal's property for his own private debt; but he has a lien for the premiums and for the commission on the policy (*q*). And the principal, or his assignee, cannot recover the policy from the broker, if the factor be entitled to a lien as against the principal; in such a case the broker will be considered to be holding as the servant of the factor, and will be entitled to retain in that character till the factor's claim be satisfied (*r*).

270. A banker or other person who has advanced money on a bill for a customer, or has accepted a bill for the accommodation of another, may, if his account be overdrawn, retain the bill or any money in the hands of the discounter or lender belonging to the person accommodated to answer the outstanding bill, or until an indemnity be given against it, although the remedy on the bill itself be barred by the Statute of Limitations (*s*); and although at the time of acceptance, the person accommodated had committed a secret act of bankruptcy upon which a commission afterwards issued (*t*). And the acceptor has been allowed to retain the full amount of bills accepted where, after they fell due and before an act of bank-

(*n*) Taylor *v.* Kymer, 3 B. & Ad. 320.

(*o*) Rabone *v.* Williams, 7 T. R. 360, n.; Stracey *v.* Deey, id. 361, n.; George *v.* Clagett, id. 359.

(*p*) Maanss *v.* Henderson, 1 East, 335.

(*q*) Snook *v.* Davidson, 2 Camp. 218.

(*r*) Man *v.* Shiffner, 2 East, 523.

(*s*) Madden *v.* Kempster, 1 Camp. 12; Morse *v.* Williams, 3 id. 418; Bolland *v.* Bygrave, Ry. & M. 271; Giles *v.* Perkins, 9 East, 13, per Lord Ellenborough: The London banker has a lien on a bill deposited with him, though not endorsed; whereas the county banker, who, it is said, always takes the bill indorsed, has not only a lien but a legal remedy on the bill by the indorsement. But neither has any lien till the account is overdrawn.

(*t*) Wilkins *v.* Casey, 7 T. R. 711; per Lord Ellenborough in Willis *v.* Freeman, 12 East, 659.

ruptcy by the drawer, the holders of the bills, in order to relieve the acceptor from responsibility (which intention was proved), delivered up the bills to him on payment of a composition, on the ground that the bankrupt and his assignees had received the full benefit of the discharge of the bills, and that the composition was made for the relief of the acceptor (*u*).

271. Where property has once been appropriated for the payment of bills, though the appropriation was for the benefit of the acceptor, the liability will remain notwithstanding his bankruptcy; and though no contract was made with the holder of the bills, he has an equity to the benefit of the contract between the principal debtor and the person indemnified, by virtue of which he is entitled to a specific application of the fund in discharge of the bills (*x*). Such an appropriation overrules the general lien of the depositee upon the property deposited: it has, however, been doubted whether a specific appropriation can be made when the general lien has once attached (*y*), and it is submitted that for the purpose of raising an equity in favour of the bill holder it cannot, as he has not paid his money on the credit of such an appropriation. Where there is a direct contract with the bill holder for the application of the property he of course claims independently of such an equity (*z*).

The drawer of bills, who has made such a deposit for the indemnity of the acceptors, cannot intercept this equity of the bill holders by setting up a lien on the deposited property in respect of a loss to him, occasioned by the improper dealings of the acceptors with other property deposited for the purpose of meeting their acceptances on his account (*a*).

272. By the general law merchant, a banker or broker is

(*u*) Stonehouse *v.* Read, 3 B. & C. 669.

(*x*) Ex parte Waring, 19 Ves. 345; Ex parte Perfect, Mont. 25; Ex parte Parr, Buck. 191; per Erskine, C. J., in Ex parte Prescott, 3 D. & C. 218; Ex parte Carrick, 2 De G. & J. 208.

(*y*) Inman *v.* Clare, 5 Jur., N. S. 89; in which it was proved to be the custom of the cotton trade, that if a merchant put cotton into a broker's hands for sale, and the broker accept a bill on account of it, which is negotiated, the proceeds of the cotton must be applied by the broker to meet the acceptances.

(*z*) See Ex parte Copeland, 3 D. & C. 199; Ex parte Brown, 2 Jur. 82.

(*a*) Ex parte Carrick, 2 De G. & J. 208.

also entitled to a lien upon bills and papers deposited with him by his customers, and which are not known to the depositees to be the property of a third person, for the general balance due from the customer, unless there be evidence that the deposit was made under special circumstances, or for special purposes, which would take it out of the general rule (*b*); and the banker's assignees in bankruptcy, by virtue of the lien, may sue the drawer of securities so deposited which are payable to bearer (*c*).

The lien has been allowed against a note paid in on a cash account to secure a debt arising on a discount transaction, and which was the subject of a separate account (*d*); and the application by the bankers of the money advanced to the discount of particular bills, does not affect the lien for their general balance upon other securities remaining in their hands (*e*).

Of the Lien of the Attorney and Solicitor upon Documents and other Chattels of his Client.

273. The lien of a solicitor upon documents in his hands for monies due to him from his client does not entitle him to enforce his claim by suit, but only to retain the documents until the payment of his claim (*f*). He may hold them as security both for monies advanced and for general professional charges. And the general lien prevails though the papers be

(*b*) Davis *v.* Bowsher, 5 T. R. 488; Bolland *v.* Bygrave, Ryan & M. 271; Brandao *v.* Barnett, 12 Cl. & Fin. 787; Jones *v.* Peppercorne, Joh. 430; Wylde *v.* Radford, 33 L. J., N. S., Ch. 51; 9 Jur., N. S. 1169. The observations of Kindersley, V.-C., in this case, have been taken to imply that the deposit of a conveyance of land is not a security which would be subject to the customary lien; but it may be doubted whether it was intended to make a distinction, the limits of which it would be so difficult to define, and without even suggesting the principle of it.

(*c*) Scott *v.* Franklin, 15 East, 428.

(*d*) Jourdaine *v.* Lefevre, 1 Esp. 66.

(*e*) Davis *v.* Bowsher, supra.

(*f*) Molesworth *v.* Robins, 2 Jo. & L. 358; Pelly *v.* Wathen, 7 Hare, 351; 1 De G., M. & G. 16—23; Bozon *v.* Bolland, 4 M. & C. 354; and see the observation of Turner, L. J., disapproving of a remark attributed to Wigram, V.-C. (7 Hare, 304), to the effect that the lien was like an equitable mortgage. (7 De G., M. & G. 339; 1 Jur., N.S. 666.) But in the Exchequer in Ireland a solicitor is reported to have been ordered to bring into court, without prejudice to his lien, deeds of a freehold estate directed to be sold; and having established his claim was held entitled to payment out of the purchase-money. (Little *v.* Little, 2 Jo. 270.)

delivered for the purpose of conducting a suit or for other particular business as occasion may arise, but where they are delivered for a specific purpose only (*g*) (which must be by special agreement (*h*)) there can be no lien beyond that purpose. Hence if a security be left by a client with his solicitor to cover certain costs, and another solicitor afterwards employed by the same client discharge the costs so due to the original depositee and receive the security from him, he acquires no lien for his own costs or beyond the amount which he paid to the first solicitor (*i*).

274. The lien applies not only to all papers which come into the hands of the attorney or solicitor in the course of conducting the client's business (*k*), but also to all other articles delivered for the purposes of the client; as, for instance, to articles to be exhibited to witnesses on the trial of an action (*l*). But whatever be the subject of the lien it must have come into the solicitor's hands in that character only; his lien is not prejudiced by his holding with the office of solicitor another office under the owners of the documents; and therefore the clerk of a corporation may retain their deeds in respect of his work as a solicitor (*m*), but they cannot be retained in respect of work done in another character. The lien therefore does not arise if the deeds were received by the solicitor as steward of a manor (*n*) or as next friend of an infant (*o*), or on paying off the debt of a client for securing which the deposit was made and so becoming an equitable transferee of the mortgage (*p*). But where he discharges the debt with the client's money given him for the purpose, and thereupon receives the deposited deeds, he receives them in the course of

(*g*) Balch *v.* Symes, T. & R. 87; Warburton *v.* Edge, 9 Sim. 508; Ex parte Sterling, 16 Ves. 257; Ex parte Pemberton, 18 id. 282; In re Bromhead, 5 Dowl. & L. 52.

(*h*) Ex parte Sterling, supra.

(*i*) Gibson *v.* May, 4 De G., M. & G. 512.

(*k*) Ex parte Nesbitt, 2 Sch. & Lef. 279.

(*l*) Friswell *v.* King, 15 Sim. 191.

(*m*) The King *v.* Sankey, 6 Nev. & M. 839.

(*n*) Champernown *v.* Scott, 6 Mad. 93.

(*o*) Montagu's Summary of the Law of Lien, 53.

(*p*) Vaughan *v.* Vanderstegen, 2 Dr. 409; Pelly *v.* Wathen, 7 Hare, 351; and see Gibson *v.* May, 4 De G., M. & G. 512.

business and in the performance of his duty to his client, and they become subject in his hands to his general lien (*q*).

275. The lien only binds documents belonging to the person by or on whose behalf the attorney was employed, and, as in the case of factors and others entitled to a general lien, will not justify the holding of the deeds of one partner for the joint debts of the firm (*r*) (**264**). This rule applies to deeds in the hands of the solicitor of a tenant for life who cannot hold them against the remainderman (*s*); or if they be lent by the trustee of the estate to the solicitor of the tenant for life, who is not the solicitor of the trustee, they cannot be retained by the person so possessed for costs due from the tenant for life (*t*).

But those who claim under the person liable to the debt are bound by the lien, as in the case of the trustees of a settlement for the preparation of which there is a lien (*u*). And where a solicitor acted for an executrix in a suit relating to the testator's estate, he was held entitled to retain the deeds relating to the testator's leaseholds against the administratrix de bonis non, in respect of the lien belonging to the executrix for her costs, but only on the assumption that she herself was not indebted to the estate (*x*).

It has however been held at law that the trustees of an estate devised to one for life with remainder over, and who employ a solicitor in causes relating to the estate, cannot give him an effectual lien on the deeds for the costs as against the remainderman (*y*).

276. The rule as to the employment of the solicitor also applies where a borrower delivers his deeds to a proposed lender, who hands them to his attorney that he may investigate the title. The loan not being effected the attorney has no lien against the owner of the deeds, though he promised to pay all the expenses; for the attorney was employed by the

(*q*) Stevenson *v.* Blakelock, 1 M. & S. 535.

(*r*) Turner *v.* Deane, 3 Exch. R. 836.

(*s*) Ex parte Nesbitt, 2 Sch. & Lef. 279.

(*t*) In re Mayhew, 7 W. R. 351, V.-C. K.

(*u*) In re Grogson, 26 Beav. 87; see also Ex parte Bullen, 1 Rose, 134.

(*x*) Turner *v.* Letts, 7 De G., M. & G. 243.

(*y*) Lightfoot *v.* Keane, 1 M. & W. 745.

proposed lender, and the borrower's promise raised no privity between him and the attorney (*z*). Even where the mortgage is completed, though in practice the attorney is paid out of the money received by the borrower, there is no lien between him and the attorney, the business being done on the credit of the lender, against whom an action will lie for the costs (*a*) (**1728**).

In the converse case where the mortgagor delivers the deeds to his own attorney that he may obtain a loan on transfer, the attorney cannot hold them against the mortgagee, by whom he was not employed (*b*).

277. The solicitor of the mortgagee, on the other hand, cannot after reconveyance (*c*), or even after discharge of the mortgage without reconveyance (*d*), hold the deeds as against the mortgagor as security for the mortgagee's costs, because the mortgagee cannot, by handing the deeds to his attorney, create a new lien against the mortgagor in respect of his own debt; but the mortgagee's attorney may hold against a purchaser, subject to the mortgage, for costs due in respect of the mortgage, whether properly payable by the mortgagor or the mortgagee; for the purchaser should ascertain by whom the deeds are held before payment of his purchase-money (*e*).

Where the mortgagor obtained the deeds from the mortgagee and placed them in the solicitor's hands to enable him to sell in fraud of the mortgagee, it was held (*f*) that the lien only covered the costs of the particular sale, as to extend it to general costs would be to enable the solicitor to profit by the fraud of his client.

278. The client being able to give to his solicitor no greater right to the deeds than he himself has (*g*), the solicitor takes them subject to any equities to which they were subject in the client's hands, though he received them without notice of such equities (*h*); and the lien cannot be enforced with

(*z*) Pratt *v.* Vizard, 5 B. & Ad. 808.

(*a*) Pratt *v.* Vizard, supra; Lawson *v.* Dickenson, 8 Mod. 306.

(*b*) Hutchinson *v.* Joyce, 2 Jo. 122;

(*c*) Wakefield *v.* Newbon, 6 Q. B., N. S. 276.

(*d*) Plumtre *v.* O'Dell, 1 Ir. Eq. Rep. 113.

(*e*) Ogle *v.* Storey, 4 B. & Ad. 735.

(*f*) Young *v.* English, 7 Beav. 10.

(*g*) Hollis *v.* Claridge, 4 Taunt. 806.

(*h*) Molesworth *v.* Robins, 2 Jo. & Lat. 358; Pelly *v.* Wathen, 7 Hare, 351, and 1 De G., M. & G. 16; Smith *v.* Chichester, 2 Dr. & War. 393.

respect to costs incurred after notice of equities arising after the deposit (*i*). If a judgment be entered up against a client after the deeds are received, the lien will not prevail against the judgment creditor as to costs which became due after the entry of the judgment (*k*); and it will not arise against the owner of prior equities, though the costs have been partly incurred for his benefit, unless the solicitor were actually employed by him (*l*).

279. No lien arises unless the papers come into the custody of the same person whose bill of costs is the subject of the claim. Therefore where solicitors in partnership have been employed by a client, who also employs them when in partnership with a third person, the original partners have no lien for costs incurred during the original employment, upon the client's deeds which have come into the hands of the new firm during their employment (*m*). So if costs due to partners from a client are vested on a dissolution in one of them, into whose possession the client's deeds afterwards come, the person so obtaining possession has no lien on the deeds in respect of such joint costs (*n*).

280. The London agents of a country solicitor are entitled to a lien as against the client of the latter upon all documents belonging to him which come into their possession from the hands of the country solicitor in the progress of the client's business, to the extent of whatever may be due from the client to the country solicitor, and from him to the London agent. But the lien is limited to the sum so due, because the country solicitor cannot transfer a greater right than he possesses; and where his debt has been discharged by payment or satisfied by set-off or otherwise when the lien is claimed, the London agent cannot retain the deeds. The courts however will so far assist the agent as to give effect to his notice to the client not to settle behind his back with the country

(*i*) Blunden *v.* Desart, 2 Dr. & War. 405.

(*k*) Blunden *v.* Desart, supra.

(*l*) Pelly *v.* Wathen, 1 De G., M. & G. 16.

(*m*) In re Forshaw, 16 Sim. 121.

(*n*) Vaughan *v.* Vanderstegen, 2 Dr. 409; see also Pelly *v.* Wathen, 7 Hare, 351, 362; but on appeal it was held that the question had not arisen.

solicitor, of the benefit of whose lien the agent may thus obtain the full advantage (*o*).

281. A solicitor will have no lien upon documents in respect of business which he knows ought not to have been transacted; as if he knowingly assist a company in acting ultra vires; although, as to monies recovered in actions arising out of such business, it has been held that he may take advantage of his lien so long as the monies remain in his hands (*p*).

282. The solicitor's right is not the same when he refuses any longer to conduct the client's business as when the client discharges him.

In the former case he is not suffered to keep the documents so as to hinder the transaction of the client's business, or the recovery of property, for which production of the papers is necessary. The solicitor indeed retains his lien in such a case, but under the condition that the client be put to no greater trouble, delay or expense than if the relation of solicitor and client remained undissolved. And this condition not being satisfied (*q*) by merely giving the client and his new solicitor free access to, with liberty to inspect and copy the papers, the solicitor who claims the lien will be ordered to deliver to the new solicitor such of the documents as the latter, on inspection, shall deem necessary for the purposes of the suit, without prejudice to the lien, and with an undertaking to return them undefaced within a specified time after the hearing (*r*); to which, where there were conflicting opinions as to the propriety of prosecuting the suit, the court has

(*o*) Bray *v.* Hine, 6 Price, 203; Waller *v.* Holmes, 1 Jo. & H. 239; 6 Jur., N. S. 1367. The courts of law formerly gave a more extended right to the agent, assuming an implied authority from the client to confer on the agent an independent lien.

(*p*) In re Phœnix Life Assurance Co., 1 H. & M. 433.

(*q*) Per Lord Eldon, Colegrave *v.* Manley, T. & R. 400; Rawlinson *v.* Moss, 7 Jur., N. S. 1052, though Sir J. Leach seems to have treated access and inspection as sufficient to satisfy the client's rights. (Moir *v.* Mudie, 1 Sim. & St. 282.) But note the difference between papers and deeds which have an intrinsic value that cannot be given to copies. (2 Hare, 590.)

(*r*) Colegrave *v.* Manley, supra, and form of order there; Lord *v.* Wormleighton, Jac. 580; Heslop *v.* Metcalfe, 3 M. & C. 183; Wilson *v.* Emmett, 19 Beav. 233; see Bozon *v.* Bolland, 4 M. & C. 354; Griffiths *v.* Griffiths, 2 Hare, 590.

added an undertaking on the part of the new solicitor to prosecute the cause with all due diligence (*s*). Where the papers were not those of a particular client, but were retained against a country solicitor by his London agent, an undertaking was required to re-deliver them if the court should so order (*t*); but where the agent had refused either to proceed with the business or to hand over the papers, a summary order for delivery, without waiting until payment of his costs, was made against him (*u*).

283. The solicitor loses his rights where he refuses to proceed until payment of costs beyond the costs of suit; or of costs (*x*) for which no bill has been delivered; or on the ground of dispute as to the manner and extent of his remuneration (*y*); and acts of misconduct on his part, in consequence of which the court considers that he ought no longer to remain in the relation of solicitor, or his imprisonment, by reason of which he can no longer carry on the business, are treated as equivalent to a discharge by the solicitor of himself (*z*). So is the dissolution of a partnership between solicitors, because the client having stipulated for the services of both is not obliged to trust to the care of one only; and in such a case it is immaterial (*a*) that only one of the partners has principally conducted the client's business. The bankruptcy of the firm of solicitors is also a discharge by themselves (*b*).

284. A new solicitor, who is employed in a suit or in any conveyancing or other matter, may demand the papers for the purpose of conducting it; but when the suit or matter is at an end, the lien of the former solicitors revives, and the papers cannot be touched for any new purpose, without payment of what is due to them. Before delivering the papers for the limited purpose, the former solicitors are also entitled to an affidavit that the papers are wanted for the completion of the

(*s*) Cane *v.* Martin, 2 Beav. 584.
(*t*) In re Smith, 4 Beav. 309.
(*u*) In re Walton, 4 K. & J. 78.
(*x*) Heslop *v.* Metcalfe, 1 Jur. 816.
(*y*) Wilson *v.* Emmett, 19 Beav. 233.
(*z*) In re Smith, 4 Beav. 309; In re Williams, 6 Jur., N. S. 908; but see In re Smith, 9 W. R. 396.
(*a*) Griffiths *v.* Griffiths, 2 Hare, 587; and see Cholmondeley *v.* Clinton, 19 Ves. 273.
(*b*) Per Lord Romilly, M. R., L. R. 2 Eq. 345, In re Moss.

business in which the firm was employed at the time of the dissolution, and in respect of which the papers come into their possession (*c*).

285. Where a solicitor dies, the full benefit of the lien is given to his representatives, because the proceedings are not delayed by any default of the solicitor. It seems, however, that the court has jurisdiction over the representatives (*d*).

286. On the other hand, when the client discharges the solicitor (*e*), the latter will not be compelled to afford any facilities to the client by giving access to the papers which the solicitor may retain until payment of his general costs. And on the bankruptcy of his client he is in the same position as if discharged otherwise than by his own act or fault; the right of the assignees not being greater than that of the bankrupt, no order to produce or give a copy on payment of the costs relating to the required document only will then be made (*f*). The circumstance that one of the members of the clients' firm which has become bankrupt is also one of the firm of solicitors, does not, where the latter firm remains solvent, alter the ordinary rule which arises on the bankruptcy of the client (*g*). The same rule entitles the solicitor of a company to resist an order for production of documents in his hands on the winding-up of the company, notwithstanding the provisions of the winding-up act authorizing an order against every person to produce the documents in his possession (*h*).

If however the solicitor voluntarily produce the papers as evidence in a cause, he cannot therefore claim a lien upon the fund recovered in the cause, though the production was essential to the obtaining of the decree; for he cannot thus by his own act create a lien upon the fund, which would be as extensive as that upon the deeds, viz. for general professional charges; the ordinary lien upon a fund being only for the

(*c*) Rawlinson *v.* Moss, 7 Jur., N. S. 1052.

(*d*) Redfearn *v.* Sowerby, 1 Sw. 84.

(*e*) Lord *v.* Wormleighton, Jac. 580; Bozon *v.* Bolland, 4 Myl. & Cr. 354, overruling Worrall *v.* Johnson, 2 J. & W. 214.

(*f*) Ex parte Underwood, 1 De G. & J. 190.

(*g*) In re Moss, L. R., 2 Eq. 345.

(*h*) In re Oxford, &c., Rail. Co. 1 De G. & S. 728.

costs of the suit in which it was recovered. The lien is not changed or transferred by the production of the deed, but remains as a lien upon it, though its value may be gone (*i*).

287. The solicitor's right is limited by the lien; and if a new solicitor be appointed during the progress of a suit the former one has no right to require the proceedings to be suspended until payment of his bill (*k*). And if the solicitor, though discharged by the client, have not delivered his bill of costs within the month required by the order for taxation, he will be compelled to hand over the papers without prejudice to his lien, especially if the papers required are not all which he holds, and if he have a balance in hand towards payment of his demand; because by disregarding the obligation to deliver his bill he has disentitled himself to the full benefit of his lien (*l*).

An offer by a solicitor to proceed with the cause, after he has discharged himself by assigning his business, will not prevent the order for delivery (*m*).

288. The lien of the solicitor is only a right between his client and himself (*n*); if the client be bound to produce a deed for the benefit of a third person, so also must the solicitor notwithstanding his lien. But although production will be ordered of a deed for the purposes of evidence, on behalf of a person whose interests are affected by it, and who is not liable to pay the debt in respect of which the lien is claimed, such an order for production will not extend to delivery or be made so as otherwise to prejudice the lien (*o*); and where the solicitor's lien is collateral to the cause he will not be compelled to produce it by an order in the cause, but must be

(*i*) Perkins *v.* Bradley, 1 Hare, 219; Bozon *v.* Bolland, 4 M. & C. 354; Hall *v.* Laver, 4 Y. & C. 216; 1 Hare, 571. It seems to be otherwise where production is ordered.

(*k*) Merewether *v.* Mellish, 13 Ves. 161; Twort *v.* Dayrell, id. 195; O'Dea *v.* O'Dea, 1 Sch. & Lef. 315.

(*l*) Cooper *v.* Hewson, 2 Y. & C. C. C. 515.

(*m*) Colegrave *v.* Manley, T. & R. 400.

(*n*) Furlong *v.* Howard, 2 Sch. & Lef. 115.

(*o*) Brassington *v.* Brassington, 1 Sim. & St. 455; Hope *v.* Liddell, 20 Beav. 438; 7 De G., M. & G. 331; 1 Jur., N. S. 665; Thompson *v.* Mosely, 5 Car. & P. 501; In re Cameron's Coalbrooke Rail. Co., 25 Beav. 1.

served with a subpœna duces tecum (*p*). The person who is liable to the debt, claiming the deed for his own purposes, may be denied access to it until payment of the claim (*q*). Nor will any lien be a protection against the liability to produce a deed which it is the object of the suit to impeach (*r*).

Again, if the property of the client be in danger of loss by the detention of the papers, it seems the court will order delivery, that the property may be secured and brought into court (*s*). And the lien will not be suffered to intercept the completion of an order of the court, which will be ordered to be produced to the proper officer for completion, and to be returned when complete to the claimant, who is allowed costs (20*s*.) for his attendance; and he will be declared entitled to a lien on any fund in court, or to be paid in the cause, for the amount of his bill of costs (*t*).

If an order be made in a suit by an infant plaintiff by his next friend, for the deposit of the deeds in court for the purpose of discovery, and the plaintiff having attained his majority repudiate the suit before the hearing, the deeds will be ordered to be redelivered to the defendant by whom they were deposited, without regard to any claim by the plaintiff's solicitor for a lien for his costs, even assuming that a lien could be acquired under such circumstances: because the repudiation relates back to the commencement of the suit, and prevents the latter from affecting the right of the holder of the deeds to dispose of them (*u*).

289. Where deeds deposited in the solicitor's hands, only for the purposes of the suit, are directed to be given up by the decree, the solicitor being unable to acquire any lien on them after the commencement of the suit, and having no prior lien, will be ordered to deliver them unconditionally (*x*); but

(*p*) Busk *v.* Lewis, 6 Mad. 29.

(*q*) See Brassington *v.* Brassington, Hope *v.* Liddell, and In re Cameron's, &c. Co. supra.

(*r*) Balch *v.* Symes, T. & R. 87.

(*s*) Richards *v.* Platel, Cr. & Ph. 79; 5 Jur. 834.

(*t*) Clifford *v.* Turrill, 2 De G. & S. 1; and see Benyon *v.* Amphlett, 8 Jur., N. S. 759.

(*u*) Dunn *v.* Dunn, 1 Jur., N.S. 122; 3 Drew. 17; 7 De G., M. & G. 25.

(*x*) Baker *v.* Henderson, 4 Sim. 27; Bell *v.* Taylor, 8 Sim. 216; and see Smith *v.* Chichester, 2 Dru. & War. 393.

otherwise if they did not come into his possession for the purposes of the cause only, but for those and other purposes: and if the lien claimed be for other matters besides the costs of the suit, and for costs incurred prior to the right of the person who seeks the delivery of the deeds (*y*).

290. Where a person is ordered to produce documents in the hands of his solicitor, who claims a lien upon them, the client must discharge the lien, and produce the deeds (*z*). And if there be a difficulty in getting possession of them, as if the person on whom the order is made be bankrupt and unable to discharge the claim, the order will still be made, with liberty to apply to the court for relief if it cannot be obeyed (*a*); or the court will from time to time enlarge the period for production, so as to enable the party to recover the possession of the deeds (*b*).

It has been said (*c*) that this course will be followed where deeds belonging to a trust have come to the solicitor's hands, and he claims to hold them subject to a lien. But if a solicitor receive documents, with notice that they belong to a trust, he incurs an immediate liability to those for whom his client was trustee, and is subject to the same remedies as the trustee himself for recovering possession of the deeds (*d*).

In such a case it seems that the court has jurisdiction upon petition to order delivery of the deeds; but in some cases (as probably where the deeds are not in the solicitor's hands by reason of his employment as trustee but in some other way, and it would seem without notice of the trust) it may be necessary to make the solicitor a party to the suit (*e*).

291. Where the committees of a lunatic, who were ordered to raise money on mortgage, were prevented from completing the security by the claim of solicitors to retain the deeds under a lien, it was ordered that the proposed mortgagees

(*y*) Warburton *v.* Edge, 9 Sim. 509.

(*z*) Ex parte Shaw, Jac. 271; see Liddell *v.* Norton, Kay, xi.

(*a*) Rodick *v.* Gandell, 10 Beav. 270.

(*b*) Goodchap *v.* Weaving, 16 Jur. 586, as in the case of an executor whose books are in a distant country. (Freeman *v.* Fairlie, 3 Mer. 44.)

(*c*) Goodchap *v.* Weaving, supra.

(*d*) Francis *v.* Francis, 2 De G., M. & G. 73.

(*e*) Goodchap *v.* Weaving, 16 Jur. 586; and see Rider *v.* Jones, 2 Y. & C. C. C. 329.

should be at liberty to pay the committees sufficient to enable them to discharge the lien, without prejudice to the lunatic's right to have the bill of costs taxed and the accounts investigated (*f*).

292. It seems that the solicitor has no lien upon the original will of his client (*g*); where such a lien was claimed, an application for a prohibition restraining the spiritual court from compelling the will to be brought in was refused, on the ground that it could not be assumed that the spiritual court would act in derogation of the common law rights of the parties (*h*). There is also generally no lien upon proceedings in bankruptcy, but where the bankruptcy has been superseded, the right has been considered to be doubtful (*i*).

293. Courts of law have generally refused to exercise their summary jurisdiction over attornies by compelling them to deliver up documents, where, there being no cause in court, nor any criminal conduct imputed to the attorney, the matter has been the proper subject of a bill in equity or of an action at law. And the rule has been laid down, that where an attorney was employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute the trust reposed in him; but where the employment was so connected with his professional character as to afford a presumption that it formed the ground of his employment by the client, there the court will exercise its jurisdiction (*k*). An application against an attorney holding the documents as a steward has on this ground been refused (*l*). But the order was made where it was clear there could be no lien (*m*).

(*f*) In re Davies (a lunatic), 12 L. J., N. S., Ch. 456.

(*g*) Balch *v.* Symes, T. & R. 87; Georges *v.* Georges, 18 Ves. 294.

(*h*) Ex parte Law, 2 Ad. & El. 45.

(*i*) Ex parte Shaw, Jac. 270; Ex parte Hardy, 1 Rose, 395.

(*k*) Per Abbott, C. J., In re Aitkin, 4 B. & Ald. 47; see Cocks *v.* Harman, 6 East, 404. Professedly followed in Re Lowe, 8 id. 237, though the employment seems to have been that of an attorney. (See In re Millard, 1 Dow, P. C. 140.) And in Hughes *v.* Mayre, 3 T. R. 275, the attorney, as steward of a manor and receiver, was ordered to deliver.

(*l*) Cocks *v.* Harman, supra.

(*m*) In re Sharpe, 1 Dow, P. C. 432.

The jurisdiction is also exercised by courts of equity (*n*) where the documents are received by the solicitor in the way of his business.

Where a deed is in the hands of an attorney as a party and trustee, a court of law, even on his submission to do so, will not order him to deliver it (*o*).

Where the solicitor's claim to a lien on the deed of a bankrupt is disputed, the remedy of the assignees for the recovery of the deed is by action of trover (*p*).

294. An attorney on discharge of his bill is bound to deliver up all drafts and copies for which his client has paid as well as original documents (*q*).

295. The courts and judges of the courts of law and equity have power, where they are authorized to refer the bill of an attorney or solicitor for taxation, to make an order for the delivery by him, his executor, administrator or assignee of the bill, and for the delivery of deeds, documents or papers in his possession, custody or power, or otherwise touching the same, as was done by such courts or judges where any such business had been transacted in the court in which such order was made (*r*).

Of Specific Liens.

(1.) *In respect of Labour upon the Chattel.*

296. The lien for the price of labour bestowed upon a chattel arises only when the work has been completed (*s*). It has been admitted on various occasions to be the right of the accountant (*t*), the coachmaker (*u*), the dyer (*v*), the miller (*x*),

(*n*) Ex parte Earl of Uxbridge, 6 Ves. 425; In re Murray, 1 Russ. 519. So in the exercise of the general jurisdiction over solicitors. (In re Blanchard, 3 De G., F. & J. 131.) In an Irish case, where a lien was disputed, the solicitor was ordered at the hearing to bring the deeds into court without prejudice to his lien, and an inquiry was directed as to its existence and extent. (Walcott *v.* Graves, 11 Ir. Eq. Rep. 396.)

(*o*) Pearson *v.* Sutton, 5 Taunt. 364.

(*p*) In re Llewellyn, 8 Jur. 816.

(*q*) Ex parte Horsfall, 7 B. & C. 528.

(*r*) Attornies and Solicitors Act, 6 & 7 Vict. c. 73, s. 37.

(*s*) Per Parke, B., in Pinnock *v.* Harrison, 3 M. & W. 533.

(*t*) Ex parte Southall, 12 Jur. 576.

(*u*) Houlditch *v.* Milne, 3 Esp. 86; Pinnock *v.* Harrison, supra.

(*v*) Green *v.* Farmer, 1 W. Bl. 652; 4 Bur. 2221.

(*x*) Ex parte Ockenden, 1 Atk. 235.

the packer (*y*), the printer (*z*), the shipwright (*a*) and the tailor (*b*). It is also allowed to certificated conveyancers (*c*), parliamentary agents (*d*) and commissioners for taking acknowledgments of married women (*e*), who may retain for their fees not merely the deed, but also the certificate of execution and the affidavit of verification.

The lien is not confined to distinct parts of the goods in respect of the work done upon those parts, but carries a right to retain every part for the price of the labour bestowed upon them all. Hence the tailor has a lien for the price of the whole suit of clothes upon every part of them; and the printer may retain such copies as are in his hands of a work which he has printed as security for the whole balance due on the printing, and not merely for printing the copies which remain in his hands (*f*).

297. The principle of the lien for the price of labour extends to those cases in which the bailee has bestowed trouble, expense or skill, though without actual labour, in the improvement of the chattel. It therefore entitles the trainer of a horse to retain it for its keep and exercise (*g*), and the horse breaker (*h*) has probably the same right in respect of his skill; though the mere stable-keeper has none (**257**). The owner of a stallion has also a lien upon a mare for his charge for covering (*i*).

298. The lien attaches only where the work has been done at the request or by the authority of the owner of the

(*y*) Ex parte Deeze, 1 Atk. 228.

(*z*) Blake *v.* Nicholson, 3 M. & S. 167.

(*a*) Ex parte Bland, 2 Rose, 91; Somes *v.* British Empire Shipping Co., 8 H. L. Cas. 338. But in the port of London it is or was the custom for shipwrights to give credit for repairs to ships for a period varying with the nature of the trade in which the ship was employed; and in the absence of an express agreement for ready money, this was the basis of the contract, and excluded the lien. (Raitt *v.* Mitchell, 4 Camp. 146.)

(*b*) Per Haydon, J., Hostiler's case, Year Book, 5 Edw. 4, E. T., pl. 20.

(*c*) Steadman *v.* Hockley, 15 L. J., N. S., Exch. 332; see Christian *v.* Field, 2 Hare, 177.

(*d*) Ridgway *v.* Lees, 25 L. J., N. S., Ch. 584.

(*e*) Ex parte Grove, 3 Bing., N. C. 304.

(*f*) Blake *v.* Nicholson, 3 M. & S. 167.

(*g*) Bevan *v.* Waters, 3 Car. & P. 520.

(*h*) Per Bolland, B., in Judson *v.* Etheridge, 1 Cr. & M. 743.

(*i*) Scarfe *v.* Morgan, 4 M. & W. 270.

chattel (*k*), and only upon the chattel itself whereon the labour, skill or money has been bestowed; not upon the instrument with which the workman has wrought. Stereotype, and it seems also copperplate, printers have therefore no lien upon (*l*) the plates from which they have printed for the costs of the printing, though such a lien may be established by evidence of usage. In like manner a conveyancer has no lien upon documents with and in respect of which only he has transacted business, but upon which he has bestowed no labour; nor has a person to whom a mortgage deed is delivered, that he may receive the debt secured by it, any lien upon the document for his charge for making the application (*m*). And documents in the hands of persons, as officers of a court of justice, as the commission in the hands of the commissioners for making a partition, cannot be retained for the incidental charges, but must be returned into the court, to which application must be made for payment (*n*); nor can a clerk of assize retain the records of the court, or the clerk of inrolments in bankruptcy the proceedings which he has inrolled, until payment of their fees (*o*); nor the assignee of a bankrupt a dividend, which in his official character it is his duty to pay, for the satisfaction of his private debt (*p*); nor can a lien be enforced upon the bankrupt's books as against the official or creditors' assignee of a bankrupt (*q*); nor upon a bankrupt's certificate (*r*).

299. There is also a lien at law to secure the reward for salvage of goods lost by perils of the sea; but this does not extend to any reward for or even to the costs of placing stray goods in safety, such as timber which has been loose in a river and thrown upon the bank by the tide (*s*).

(*k*) Hiscox *v.* Greenwood, 4 Esp. 174.

(*l*) Bleaden *v.* Hancock, 4 Car. & P. 152. In Marks *v.* Lahèe, 3 Bing. N. C. 408, a lien was claimed on copper plates for money lent and labour in printing from them; but the right to the latter claim was not discussed.

(*m*) Steadman *v.* Hockley, 15 L. J., N. S., Exch. 332; Sanderson *v.* Bell, 2 Cr. & M. 304.

(*n*) Young *v.* Sutton, 2 Ves. & B. 365.

(*o*) The King *v.* Bury, 1 Leach, Cr. Cas. 201; Ex parte Sandison, 1 Rose, 275.

(*p*) Ex parte White, 1 Atk. 90.

(*q*) 24 & 25 Vict. c. 134, s. 12.

(*r*) Anon., 1 R. & M. 330.

(*s*) Nicholson *v.* Chapman, 2 H. Bl. 254.

(2.) *In respect of Acts done under a Legal Obligation, and herein of the Lien of the Innkeeper, the Carrier and others.*

300. To the innkeeper and the carrier a specific lien is given by law in respect of their obligation to perform the duties of their respective callings (*t*); to the latter against the particular goods, which he transmits for a reasonable reward to be paid for the carriage of them, and to the former against the chattels of his guest for his board and expenses at the inn. For the same cause a lien is allowed to the farrier (*u*).

301. The lien of the innkeeper (in which term is included every person who provides accommodation for such travellers and sojourners as are able to pay for it a reasonable compensation, whether his inn is or is not frequented by public conveyances or furnished with stables (*x*),) arises only where the owner of the goods upon which the lien is claimed is the innkeeper's guest, and it affects only such of the goods of the guest as the innkeeper in performance of his duty to the public is bound to receive. He cannot therefore detain goods which he knows were furnished by a third person for the temporary use of the guest (*y*), and he has no lien for the keep of a horse or the standing-room of a carriage (*z*) left with him by a person who at the time of leaving them was not his guest; nor will the lien arise in such a case because the owner afterwards becomes an occasional guest at the inn (*a*).

302. But for the keep of horses brought by a guest to his inn, even though they be occasionally removed, provided the removals be with an intention to return, the innkeeper has a lien (*b*). And his rights in this respect are so extensive that he may detain a horse or other property brought by a guest

(*t*) Naylor *v.* Mangles, 1 Esp. 109; Rushforth *v.* Hadfield, 6 East, 519; 7 id. 224.

(*u*) Rushforth *v.* Hadfield, 7 East, 229; and see per Holt, C. J., in Lane *v.* Cotton, 1 Salk. 17.

(*x*) Thompson *v.* Lacy, 3 B. & Ald. 288.

(*y*) Broadwood *v.* Granara, 10 Exch. 417.

(*z*) Binns *v.* Pigot, 9 Car. & P. 208. Though it has been held that by the mere leaving a horse the leaver became a guest. (York *v.* Grindstone, 1 Salk. 388.)

(*a*) Smith *v.* Dearlove, 6 C. B. Rep. 132.

(*b*) Allen *v.* Smith, 12 C. B., N. S., 638; 9 Jur., N. S., 230, 1284.

who is not the lawful owner of it, even though it be stolen (*c*), provided that at the time of the deposit the innkeeper had no notice of the wrongful nature of the possession.

303. The innkeeper is not bound, where the guest is sui juris, to inquire into the necessity or propriety of the supplies to him, in respect of which the lien is claimed (*d*). But it seems he cannot claim a lien for money lent to the guest, except by special agreement made at the time of the advance (*e*).

304. Neither the lien of the innkeeper nor that of the carrier extends to the body of the guest or passenger, or to the clothes upon his person (*f*).

305. The carrier, undertaking and being bound by law to receive and carry for a reasonable reward the goods of all persons indifferently, his lien for the carriage extends, as in the case of the innkeeper, to stolen goods delivered to him in the way of his trade; provided that at the time of the delivery he had no notice of the wrongful title (*g*). The carrier's lien only applies to the price of the carriage; when an attempt was made to extend it to charges for booking and warehouse room, it was said there was no lien for such charges (*h*), though in the particular case they were not actually due.

It has also been held that a stage coachman has not the privilege of a carrier unless he takes a distinct price for the carriage of the goods as well as of passengers (*i*).

306. The shipowner, like any other carrier, is entitled by law to a lien upon his passenger's goods, including personal

(*c*) Yorke *v.* Greenaugh, 2 Lord Raym. 866; Johnson *v.* Hill, 3 Stark. 172; Robinson *v.* Walter, 3 Bulst. 269; Turrill *v.* Crawley, 13 Jur. 878.

(*d*) Procter *v.* Nicholson, 7 C. & P. 67.

(*e*) Id.

(*f*) Wolff *v.* Summers, 2 Camp. 631; Sunbolf *v.* Alford, 3 M. & W. 248. By an old statute any innkeeper, alehouse keeper, victualler, sutler, or other retailer who should sell ale or beer in a vessel not signed, stamped or marked according to the act, or who, in giving any account or reckoning in writing or otherwise, should refuse or deny to give in such account the particular number of quarts or pints of ale or beer for which demand was made, was forbidden for default of payment of the reckoning to detain any goods or other things belonging to the person from whom the reckoning should be due. (11 & 12 Will. 3, c. 15, s. 2. Rep. 30 & 31 Vict. c. 59.)

(*g*) The Exeter Carrier's case, cited by Holt, C. J., 2 Lord Raym. 867.

(*h*) Lambert *v.* Robinson, 1 Esp. 119.

(*i*) Middleton *v.* Fowler, 1 Salk. 282.

luggage, for his passage money (*j*); and upon the goods carried in the ship (so long as they remain undelivered (*k*)) as security for the freight or reward which becomes payable upon the delivery and for the safe carriage of the goods, but not in case of their loss (*l*).

This lien binds every part of the cargo, in the hands of a single consignee or purchaser (*m*), as security for the whole freight. But if the cargo be sold to different persons, one cannot be made to pay for the freight of what has been delivered to another (*n*).

307. The manner and time of payment for the hire of ships, and the conveyance of their cargoes, are however often the subject of special contracts, in which the word "freight" is not only used in the strict sense above mentioned, but is made to apply to money payable on taking goods on board to be carried on the voyage, and irrespective of the contingency of the ship's safe arrival; and also to the unliquidated compensation for the loss of freight which would have been payable on such goods as the ship might have carried, where she is not fully laden, and which is commonly known as *dead freight*. In respect of this there can be no lien either by law or by contract; because no goods being carried, there is nothing upon which the lien can attach, and a covenant for payment of it will create no lien on the other goods in the ship (*o*). Nor has money payable at the port of shipment, or before the arrival of the ship at the port of discharge, the legal character of freight. Any lien which arises in respect of such money must depend upon the terms of the contract under which it becomes payable; and where there is no lien under the contract, none will be implied by law (*p*).

Therefore where by a bill of lading goods were made deliverable to the order of the shipper, and the freight, so called, was made payable at the home port one month after

(*j*) Wolff *v.* Summers, 2 Camp. 631.

(*k*) North *v.* Gurney, 1 Jo. & H. 509.

(*l*) How *v.* Kirchner, 4 Moo. P. C. 21; Kirchner *v.* Venus, 5 Jur., N. S. 395.

(*m*) Sodergreen *v.* Flight, cited 6 East, 622.

(*n*) See Bernal *v.* Pim, 1 Gale, 17.

(*o*) Phillips *v.* Rodie, 15 East, 547; Gladstone *v.* Birley, 2 Mer. 401.

(*p*) Kirchner *v.* Venus, 5 Jur., N. S. 395.

the sailing of the vessel, lost or not lost, it was held that the reward being payable irrespective of the arrival of the ship, was not freight; and there being no special contract for a lien, the goods could not be detained at the port of delivery on the ground of non-payment; and the local usage at the port of shipment, under which the owner did not lose his lien for freight by making it payable there, was held not to bind a bonâ fide indorsee for value of the bill of lading without notice (*q*).

308. The questions which usually arise as to the right to a lien under contracts by way of charter-party are, whether they transfer the temporary ownership of the vessel to the charterer, and whether the delivery of the cargo is to precede, follow or be coincident with the payment for the hire of the ship. As to the temporary ownership, the courts, looking at the whole contract and the intention of the parties, will not deprive the owner of his lien because of the use of particular words, which, taken alone, might seem to give the possession to the charterer; even where words of actual demise, such as "let" and "hire," are found in the instrument (*r*); though where there are words large enough to import a demise, and the master is appointed by the charterer, who is responsible for him, and the master receives the freight on the charterer's account, irrespective of the delivery of the cargo and of the payment of the hire of the ship, or where a clear intention to pass the possession to the charterer is otherwise shown, there can be no lien (*s*).

If the freight be made payable either in cash or by bills to be delivered on the arrival of the ship, or on or before the delivery of the cargo, the owner will retain his lien (*t*); whereas it will be destroyed by a stipulation for payment of

(*q*) How *v.* Kirchner, 11 Moo. P. C. 21; Kirchner *v.* Venus, overruling Gilkison *v.* Middleton, 2 C. B., N. S. 134; Neish *v.* Graham, 8 El. & Bl. 505; 4 Jur., N. S. 49.

(*r*) Christie *v.* Lewis, 2 Brod. & B. 410; 5 Mo. 211; Campion *v.* Colvin, 3 Bing. N. C. 17; Saville *v.* Campion, 2 B. & Ald. 503, overruling Hutton *v.* Bragg, 7 Taunt. 13.

(*s*) Belcher *v.* Capper, 4 M. & G. 502; see Newberry *v.* Colvin, 7 Bing. 190.

(*t*) Tate *v.* Meek, 8 Taunt. 280; Saville *v.* Campion, 2 B. & Ald. 503; Campion *v.* Colvin, supra; Faith *v.* East India Co., 4 B. & Ald. 630.

the freight after or irrespective of the delivery of the goods; as, for instance, two months after the vessel's report inwards (*u*).

309. The goods having been shipped for delivery according to the contract, the ship owner has a right to earn his freight, and for that purpose he may refuse to redeliver them to the charterer until payment of the freight which might have been earned, and until indemnity be given against the consequences arising from any dealings with the bill of lading signed by the master; and these conditions must be performed before the contract, which can only be dissolved by the consent of both parties, can be determined (*x*). The principle of this decision appears to be equally applicable to cases in which there is, as to those in which, as it happened in the cases cited, there is not a lien under the contract for the freight.

310. Where a charter-party is entered into, under which, as between the ship owner and the charterer, the former has a lien for the payment, his lien remains unaltered whether the bill of lading be endorsed to a third person for valuable consideration, or the goods be made deliverable to the original consignee (*y*).

311. If the consignees abroad, with notice of the charter-party, or the charterer's agent, procure cargo on homeward freight consigned to persons who also have notice and take bills payable in a manner inconsistent with a lien, this will not deprive the owner of his lien under the charter-party, which will extend to the goods placed on board by different shippers abroad to the extent of the freight due on each of those consignments. And if the goods in such a case be purchased and shipped by the consignees abroad on account of the charterer, though consigned to creditors of those consignees, they will be subject to the owner's lien to the full extent of

(*u*) Lucas *v.* Nockels, 4 Bing. 729; Alsager *v.* St. Katharine's Dock Co., 14 M. & W. 794; Foster *v.* Colby, 3 H. & N. 705; and see Belcher *v.* Capper, 4 M. & G. 502; Tamoaco *v.* Simpson, 19 C. B., N. S. 453.

(*x*) Tindall *v.* Taylor, 4 El. & Bl. 219. In Thompson *v.* Small, 1 C. B. 328, payment was offered and delivery refused, and the refusal was held to amount to a conversion. (See also Thompson *v.* Traill, 2 C. & P. 334.)

(*y*) Small *v.* Moates, 9 Bing. 574.

freight due under the charter-party (*z*). So, if the lading belongs to the charterer, and is subject to the ship owner's lien under the charter-party, the lading, if sold by the charterer after it is put on board, will pass to the purchaser subject to the lien (*a*).

312. Port charges being properly payable by the owner of the ship, he has no lien upon the cargo for such part of them as the freighter has agreed but neglected to pay (*b*); nor for wharfage where by the contract the goods are deliverable upon payment of the freight (*c*); nor for demurrage either by law, or by virtue of a covenant binding the ship and the cargo to be laden on board, for the performance of the contract (*d*).

313. The master has a possessory lien at common law as the owner's agent, upon the goods carried, not only for the freight but also for general average (*e*). And although the Court of Admiralty does not take notice of general average for the purpose of giving effect to a lien at the instance of a person seeking to establish it, the court cannot annul, but is bound to act upon the right where acquired by the master in a case over which the court has jurisdiction (*f*).

314. The following regulations have been made (*g*) concerning the liens of ship owners:—

If the ship owner gives to the wharf or warehouse owner notice in writing that the goods landed from the ship and placed in his custody are subject to a lien for a specific amount for freight or other charges to the ship owner, the goods will remain so subject in his hands as before the landing thereof; and the wharf or warehouse owner failing to retain them until the lien is discharged is made responsible to the ship owner for any loss thereby occasioned to him (*h*).

(*z*) Faith *v.* East India Co., 4 B. & Ald. 630; Campion *v.* Colvin, 3 Bing. N. C. 17.

(*a*) Small *v.* Moates, supra.

(*b*) Faith *v.* East India Co., 4 B. & Ald. 630.

(*c*) Bishop *v.* Ware, 3 Camp. 360.

(*d*) Phillips *v.* Rodie, 15 East, 547; Birley *v.* Gladstone, Gladstone *v.* Birley, 3 M. & S. 205; 2 Mer. 401.

(*e*) Scaife *v.* Tobin, 3 B. & Ald. 523, per Lord Tenterden.

(*f*) Cleary *v.* M'Andrew, Cargo ex Galam, 2 Mo. P. C., N. S. 216; 33 L. J., N. S., Ad. 97.

(*g*) Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63).

(*h*) Sect. 68. For similar provisions respecting goods landed at certain sufferance wharves in the port of London, see the earlier private act, 11 & 12 Vict. c. xviii, s. 4.

315. The lien will be discharged by production to the wharf or warehouse owner of a receipt for the amount claimed, and delivery to him of a copy thereof, or of a release of freight from the ship owner (*i*); or by deposit by the owner of the goods with the wharf or warehouse owner of a sum of money equal to the amount claimed by the ship owner (*k*). And if the person who makes the deposit does not within fifteen days of making it give to the wharf or warehouse owner notice in writing to retain it, stating in the notice the sum, if any, which he admits to be payable to the ship owner, or that he does not admit any sum to be payable, the wharf or warehouse owner may at the expiration of the fifteen days pay over the sum so deposited to the ship owner, and shall by such payment be discharged from all liability in respect thereof (*l*).

But if the person making the deposit does, within fifteen days after making it, give to the wharf or warehouse owner such notice in writing as aforesaid, the latter shall immediately apprize the ship owner of such notice, and shall pay or tender to him out of the deposit the sum, if any, admitted by the notice to be payable, and shall retain the balance, or if no sum is admitted to be payable, the whole of the deposit, for thirty days from the date of the notice; at the expiration of which, unless legal proceedings have in the meantime been instituted by the ship owner against the owner of the goods to recover the said balance or sum, or otherwise for the settlement of any dispute between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof (*m*).

316. If the lien is not discharged and no such deposit is made the wharf or warehouse owner may, and if required by the ship owner shall, at the expiration of ninety days from the time when the goods were placed in his custody, or if the goods were of a perishable nature at such earlier period as he in his discretion thinks fit, sell by public auction either for

(*i*) Sect. 69.
(*k*) Sect. 70.
(*l*) Sect. 71.
(*m*) Sect. 72.

home use or exportation the said goods or so much thereof as may be necessary to satisfy the charges afterwards mentioned (*n*).

317. Before making such sale the wharf or warehouse owner shall give notice thereof by advertisement in two newspapers circulating in the neighbourhood, or in one daily newspaper circulating in London, and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharf or warehouse owner or is otherwise known to him, give notice of the sale to the owner of the goods by letter sent by the post, but the title of a bonâ fide purchaser of such goods shall not be invalidated by reason of the omission to send such notice, nor shall any such purchaser be bound to inquire whether such notice has been sent (*o*).

318. In every case of any such sale the wharf or warehouse owner shall apply the monies received from the sale as follows and in the following order.

(1.) If the goods are sold for home use, in payment of any customs or excise duties owing in respect thereof.

(2.) In payment of the expenses of the sale.

(3.) In the absence of any agreement between the wharf or warehouse owner and the ship owner concerning the priority of their respective charges, in payment of the rent, rates and other charges due to the wharf or warehouse owner in respect of the goods.

(4.) In payment of the amount claimed by the ship owner as due for freight or other charges in respect of the goods.

(5.) But in case of any agreement between the wharf or warehouse owner and the ship owner concerning the priority of their respective charges, then such charges shall have priority according to the terms of such agreement, and the surplus, if any, shall be paid to the owner of the goods (*p*).

319. Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of the act, the wharf

(*n*) Sect. 73.
(*o*) Sect. 74.
(*p*) Sect. 75.

or warehouse owner shall be entitled to rent in respect of the same, and shall also have power, from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the wharf or warehouse owner are necessary for the proper custody and preservation of the goods, and shall have a lien on the goods for the said rent and expenses (*q*).

320. Nothing in the act contained is to compel any wharf or warehouse owner to take charge of any goods of which he would not otherwise be liable to take charge, or to bind him to see to the validity of any lien claimed by any ship owner under the act (*r*), or to take away or abridge any powers given by any local act to any harbour trust, body corporate or persons, whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods, or to take away or diminish any rights or remedies given to any ship owner or wharf or warehouse owner by any local act (*s*).

Of the Lien of the Vendor of Chattels.

321. The lien of the vendor of goods (**1475**) for the purchase-money arises out of his original ownership and dominion over the property, in which respect it differs from other possessory liens, the claimants of which have no other title than the possession upon which the lien is founded. The benefit of the vendor's lien extends to factors (*t*), or persons who buy for others at their own risk, drawing bills upon them for the value of the goods and the commission (*u*); it carries with it a right (which belongs to no other kind of lien (*x*)) to stop the goods in transitu before they are delivered to the purchaser; of which hereafter (**1490**); and it overrides any lien which may exist against the purchaser, and also against a sub-purchaser from him, though the former may have been paid by the sub-purchaser (*y*).

(*q*) Sect. 76.
(*r*) Sect. 77.
(*s*) Sect. 78.
(*t*) Drinkwater *v.* Goodwin, 1 H. Cowp. 251.
(*u*) Feise *v.* Wray, 3 East, 93.
(*x*) Per Eyre, C.B., in D. P., Kinloch *v.* Craig, 3 T. R. 787.
(*y*) Dixon *v.* Yates, 5 B. & Ad. 313.

322. Where goods purchased are subject to charges payable at a future time, whether delivered or not, so that at the time of sale there is no lien for those charges, the lien will not arise (*z*) against the purchaser in consequence of default in payment of the charges at the proper time. And if the purchaser of a chattel detained for a lien pay the demand, after giving notice to the vendor, he may recover (*a*) the amount from the latter.

(*z*) Crawshay *v.* Homfray, 4 B. & Ald. 50.

(*a*) Bevan *v.* Waters, 3 Car. & P. 520.

CHAPTER III.

OF SECURITIES WHICH ARE VOID OR IMPERFECT, OR ARE MADE UNDER STATUTORY OR OTHER POWERS.

PART 1.—OF VOID AND IMPERFECT SECURITIES.
PART 2.—OF SECURITIES MADE UNDER STATUTORY OR OTHER POWERS.

PART 1.—OF VOID AND IMPERFECT SECURITIES.

323. *Of Securities which are affected by the Character or Relation of the Parties, and herein—*
324. *Of such as are fraudulent under the Statutes of Elizabeth or the Bankrupt Acts.*
354. *Of such as are obtained by Misrepresentation, Extortion or undue Influence.*
369. *Of Securities which are affected by the Nature of the Consideration; and herein of immoral Securities.*
385. *Of Securities which are affected by the Nature of the Security; and herein of Securities upon the Profits of Public Offices.*
393. *Upon Ecclesiastical Benefices.*
398. *Upon Property forbidden to be incumbered.*

Of Securities which are affected by the Character or Relation of the Parties.

323. A security may be void or imperfect by reason—

1. Of the character or mutual relation of the persons who are parties to or affected by the contract.
2. Of the nature of the consideration.
3. Of the subject of the security.

A security which is not by nature malum in se, but is only prohibited, is not necessarily void for all purposes, but so far only as it is expressly forbidden. So that although a deed which attempts to create a charge upon an ecclesiastical benefice (*a*) (**393**), an unregistered bill of sale of a ship (*b*) (**87**),

(*a*) Mouys *v.* Leake, 8 T. R. 411. (*b*) Kerrison *v.* Cole, 8 East, 231.

or a mortgage by a municipal corporation (*c*) to secure money raised for an unauthorized purpose, or made without the consent of the lords of the treasury, be invalid by statute and even declared to be utterly void, such an instrument may operate in a manner which is not forbidden by the statute, viz., by way of persoual security for the money which it was attempted to secure by mortgage, or as a security upon something which would lawfully pass by the mortgage: as in the case of an unregistered bill of sale of a ship—by way of assignment of the freight (*d*) (**95, 596**).

Of Fraudulent Securities.

324. By the statute 13 Eliz. c. 5, s. 2, every feoffment and conveyance of lands, tenements, hereditaments, goods and chattels, or of any lease, rent, common or other profit or charge thereon, by writing or otherwise, and every bond, suit, judgment and execution had or made for any intent or purpose to delay, hinder or defraud *creditors* and others of their just debts, rights and remedies, are declared only as against the persons or their representatives whose remedies are disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate and of none effect, and accordingly both at law (*e*) and in equity (*f*), so far as regards the rights of the creditors, the matter is treated as if the fraudulent conveyance had never existed.

The act, however, does not extend to any estate or interest conveyed or assured upon good consideration and bonâ fide to any person or persons not having at the time of the conveyance notice of the fraud or collusion (*g*). An assignee who stands in that position will therefore have priority over the creditors of the maker of the fraudulent assignment (*h*).

325. By the statute 27 Eliz. c. 4, s. 2, every conveyance,

(*c*) Payne *v.* Mayor of Brecon, 3 H. & N. 572. See 5 & 6 Will. 4, c. 76; and see Pallister *v.* Mayor of Gravesend, 9 C. B. 774.

(*d*) See Ex parte Jones, 2 Cr. & J. 513.

(*e*) See per Lord Tenterden, Shears *v.* Rogers, 3 B. & Ad. 362, 369.

(*f*) Per Kindersley, V.C., Hue *v.* French, 26 L. J., Ch. 317.

(*g*) Sect. 6.

(*h*) Morewood *v.* South Yorkshire Rail. Co., 3 H. & N. 798.

grant, charge, lease, estate, incumbrance and limitation of use, of, in or out of any lands, tenements or other hereditaments, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall afterwards purchase in fee simple, fee tail, for life, lives or years, the same lands, tenements and hereditaments or any part thereof, or any rent, profit or commodity in or out of the same or any part thereof, are declared void as against *purchasers* for money or good consideration, and persons claiming under them (**1298**), saving, however (*i*), all estates in and assurances of lands made for good consideration and bonâ fide. And (*k*) every conveyance or assurance of lands with a clause of revocation is declared to be void as against a subsequent assurance of the same hereditaments or any part thereof made without exercise of the power of revocation for money or other good consideration. Provided that no lawful mortgage made bonâ fide without fraud and upon good consideration shall be impeached by force of the act.

326. Under the Bankrupt Law Consolidation Act, 1849 (*l*), a trader liable under the then existing law to become bankrupt, who made or caused to be made any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or any fraudulent surrender of any of his copyhold lands or tenements, or any fraudulent gift, delivery or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, committed thereby an act of bankruptcy. But (*m*) the conveyance by deed of all his estate and effects to a trustee for the benefit of his creditors, and in compliance with the other requisitions of the act, is no act of bankruptcy, unless the petition for adjudication be filed within three months from the execution of the deed.

327. It is also (*n*) an act of bankruptcy, subject to the rules prescribed by the Bankrupt Act of 1861, for a non-trader, with intent to defeat or delay his creditors, to make any fraudulent conveyance, gift, delivery or transfer of his real or personal

(*i*) Sect. 4.
(*k*) Sect. 5.
(*l*) 12 & 13 Vict. c. 106, s. 67.
(*m*) Sect. 68.
(*n*) 24 & 25 Vict. c. 134, s. 70.

estate or any part thereof; though (*o*) under the regulations prescribed in other parts of the act the estates of a debtor not being a bankrupt may be conveyed or assigned for the benefit of his creditors.

And it is a misdemeanor (*p*) for a bankrupt, after the filing of the petition for adjudication, or within three months before adjudication, to part with, conceal, destroy, alter, mutilate or falsify any security with intent to conceal the state of his affairs, or to defeat the object of the law of bankruptcy; or within the like time, knowing that he is unable to meet his engagements, fraudulently, and with intent to diminish the sum to be divided among the general body of creditors, to mortgage, incumber or charge any part of his property, or, being a trader, with intent to defraud his creditors, and within three months before the filing of the petition for adjudication, to pawn, pledge or dispose of, otherwise than by a bonâ fide transaction in the ordinary way of trade, any of his goods or chattels which have been obtained on credit, and remain unpaid for.

328. But by the Bankrupt Law Consolidation Act, 1849 (*q*), all contracts, dealings and transactions, by and with any bankrupt, really and bonâ fide made and entered into before the date of the fiat, or the filing of a petition for adjudication, and all executions and attachments against the lands and tenements of any bankrupt, bonâ fide executed by seizure, and all executions and attachments against the goods and chattels of any bankrupt, bonâ fide executed and levied by seizure and sale before the date of the fiat, or filing of the petition, are made valid, notwithstanding any prior act of bankruptcy. Provided that the persons so dealing with, or paying to or being paid by such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing or transaction, or of executing or levying such execution or attachment, or at the time of making any sale thereunder, notice of any prior act of bankruptcy;

(*o*) Sect. 192, et infra.

(*p*) Sect. 221, cl. 7, 8, 11.

(*q*) 12 & 13 Vict. c. 106, s. 133, re-enacting in larger terms the provisions of 2 & 3 Vict. c. 29.

and that no validity shall be given to any payment, or to any delivery or transfer of any goods or chattels made by any bankrupt, being a fraudulent preference of any creditor of such bankrupt, or to any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference of any creditor of such bankrupt, or to any execution founded on a judgment, or a warrant of attorney, or cognovit, or judge's order, obtained by consent given by any bankrupt by way of fraudulent preference.

329. Under the analogous provision of 2 & 3 Vict. c. 29, a bonâ fide security by deposit made before an act of bankruptcy was held to be a protected dealing or transaction, although notice of the deposit was not given to the holder of the mortgaged property until after an act of bankruptcy(*r*).

330. Where an act of bankruptcy is committed after the execution and seizure, the execution must still be perfected by sale before the fiat or filing of the petition for adjudication; because a subsequent section of the statute (*s*) deprives the secured creditor of the benefit of his security, except in respect of an execution or extent levied by seizure and sale upon, or of a mortgage of or lien upon, any part of the bankrupt's property before the date of the fiat or filing of the petition for adjudication (*t*).

This provision, however, does not affect a judgment creditor who has obtained a sequestration against the benefice of a bankrupt clergyman; because the profits of the living are not property which, but for the security, would pass to the assignees in the ordinary way; being obtainable only by a sequestration (*u*) (**394**).

331. The statute 13 Elizabeth did not of its own force apply to copyholds, unless by tenure or special custom they were subject to debts (*x*); nor to choses in action, because they could not be taken in execution during the life of the

(*r*) In re Styan, 2 M., D. & De G. 219.

(*s*) Sect. 184.

(*t*) Hutton *v.* Cooper, 6 Exch. 159; Young *v.* Roebuck, 2 H. & C. 296. But see Edwards *v.* Scarsbrook, 3 B. & S. 280, where the latter section was not noticed.

(*u*) Hopkins *v.* Clarke, 4 B. & S. 836; 5 id. 753; 10 Jur., N. S. 439, 1071.

(*x*) Mathews *v.* Feaver, 1 Cox, 278.

debtor. But such choses in action as by virtue of 1 & 2 Vict. c. 110, s. 12, may be taken in execution, now fall within the statute 13 Elizabeth (*y*); and even before the passing of 1 & 2 Vict., after the death of the debtor, when the creditors might reach all the personal property, and during his life, when, by reason of his insolvency, all his property became subject to the payment of his debts, the statute applied (*z*). So it appears to be in bankruptcy as to property which cannot be taken in execution under 1 & 2 Vict. c. 110 (*a*); and in like manner it seems that copyholds, which are now subject to execution, have been brought within the statute (*b*). Nor can a debtor affect the creditor's right by settling the proceeds of the assignment upon his wife and family, this being an application of the money to his own purposes and a fraud against the creditors (*c*).

332. It has been held at law (*d*), that an assignment of the debtor's goods is not void against a person who only became a creditor after the date of the assignment. In equity, on the other hand, it is said (*e*) that the statute applies to the defeating of prospective as well as of existing debts; and it has been held to avoid a conveyance of the grantor's property made shortly before the trial of an action in which he was defendant, and the object of which was inferred to be the defeat of the anticipated judgment debt. But the rule has been modified where the assignment was made under ordinary circumstances before the debt accrued; on the consideration that there can be no fraudulent intent to support a bill by a subsequent creditor, unless a debt due at the date of the assignment be still subsisting (*f*).

(*y*) Barrack *v.* M'Culloch, 3 K. & J. 110. And see French *v.* French, 6 De G., M. & G. 95; and Sims *v.* Thomas, 12 A. & E. 554, per Lord Denman.

(*z*) Norcutt *v.* Dodd, Cr. & Ph. 100.

(*a*) Such property is within the provisions of the bankrupt acts themselves concerning apparent ownership (**347**).

(*b*) See Smith's Leading Cases, vol. i. p. 23, ed. 6.

(*c*) French *v.* French, 6 De G., M. & G. 95; Hue *v.* French, 26 L. J., Ch. 317; Neale *v.* Day, 28 id. 45.

(*d*) Oswald *v.* Thompson, 2 Exch. 215.

(*e*) Per Lord Hardwicke, 2 Atk. 481; Tarback *v.* Marbury, 2 Vern. 510; Barling *v.* Bishopp, 29 Beav. 417. See per Wood, V.C., Holmes *v.* Penney, 3 K. & J. 100.

(*f*) Jenkyn *v.* Vaughan, 3 Dr. 419. See Spirett *v.* Willows, 11 Jur., N. S. 70.

There is no question as to the right of a subsequent creditor to participate in the assigned property when the assignment has been set aside.

333. To support a deed under any of the above statutes, there must be a sufficient valuable consideration. As against creditors the deed will not be supported, where part of the consideration is natural love and affection (*g*); though a consideration of that kind will be taken into account against purchasers (*h*). The consideration, however, need not be pecuniary. Marriage will sustain a deed either under the statutes of Elizabeth or the bankrupt law (*i*); and under the 27th Elizabeth, a promise by an infant on marriage to settle an estate, when he should come of age, upon himself and his issue, has been held (*k*) to be sufficient consideration, though the infant could not be compelled to perform the promise. But a settlement which is not obligatory (*l*) or for valuable consideration will fail; and an act of bankruptcy will be committed notwithstanding the alleged consideration of marriage, where the circumstances show that the marriage was part of a scheme for defrauding the creditors of the husband (*m*). Assignments by means of which the debtor's property is released from distress or execution, and arrangements made with creditors, have also been supported (*n*).

334. The bona fides of a transaction is the principal test of its validity under the statute of 13 Elizabeth. If this quality be wanting, it has been said (*o*) that even the payment of a full valuable consideration, with change of possession, will not make it good. A fraudulent intention on the part of the assignor may be inferred from various circumstances. His solvency at the time of the transaction is usually an important consideration, though not absolutely decisive of the validity of a voluntary conveyance; for there may be fraud

(*g*) Mathews *v.* Feaver, 1 Cox. 278.

(*h*) Persse *v.* Persse, 7 Cl. & F. 279.

(*i*) Campion *v.* Cotton, 17 Ves. 263; Fraser *v.* Thompson, 1 Gif. 49; 5 Jur., N. S. 669.

(*k*) Lavender *v.* Blakstone, 2 Lev. 146.

(*l*) Goldsmith *v.* Russell, 5 De G., M. & G. 547.

(*m*) Colombine *v.* Penhall, 1 Sm. & G. 228.

(*n*) Arnell *v.* Bean, 8 Bing. 87; Knight *v.* Fergusson, 5 M. & W. 389.

(*o*) Per Lord Mansfield, Cowp. 432.

without insolvency, and the deed may be good though the grantor be indebted. Each case will depend upon its own circumstances; but as a general rule the transaction will be void, if it appear that there was an intention to defeat or delay the creditors, though no actual delay be caused; or if the debtor knew that delay would be the consequence of the transaction (*p*).

335. An assignment is not void because it has the effect of delaying a particular creditor, if it be made bonâ fide on the demand of a creditor, and for good consideration (*q*), and not for the mere purpose of defeating creditors (*r*). The debtor or his personal representative may therefore, at any time before execution by a judgment creditor, either secure a more favoured creditor, or provide rateably for all his creditors (*s*); and to support such a transaction, and to rebut the presumption of fraud arising from an apparent want of consideration, evidence of the real circumstances and of the existence of a valuable consideration may be given, provided it do not contradict the allegations of the deed (*t*). The subsequent execution of a security in pursuance of an agreement under which the consideration money has been previously advanced will also be good, if the original transaction be valid (*u*).

336. It was formerly considered that, to make valid under the bankrupt and insolvent acts a security by which a particular creditor was preferred, it must have been given under a pressure by the latter, amounting to coercion (*x*). The question is however now understood to be, whether the pre-

(*p*) Richardson *v.* Smallwood, Jac. 552; Townshend *v.* Westacott, 2 Beav. 340; Thompson *v.* Webster, 5 Jur., N. S. 668, 921; 7 id. 531; 4 De G. & J. 600. See Shears *v.* Rogers, 3 B. & Ad. 362; French *v.* French, 6 De G., M. & G. 95; Holmes *v.* Penney, 3 K. & J. 90.

(*q*) Darvill *v.* Terry, 6 H. & N. 807; Wood *v.* Dixie, 7 Q. B. R. 892; Hale *v.* Metropolitan Saloon Omnibus Co., 28 L. J., Ch. 777; 4 Dr. 492.

(*r*) Bott *v.* Smith, 21 Beav. 511.

(*s*) Holbird *v.* Anderson, 5 T. R. 235; Meux *v.* Howell, 4 East, 1; Pickstock *v.* Lyster, 3 M. & S. 371; Wolverhampton and Staffordshire Banking Co. *v.* Marston, 7 H. & N. 148; see Evans *v.* Jones, 3 H. & C. 423; 11 Jur., N. S. 784.

(*t*) Gale *v.* Williamson, 8 M. & W. 405.

(*u*) Hutton *v.* Cruttwell, 1 El. & Bl. 15.

(*x*) Per Lord Chelmsford, C., 3 De G. & J. 24. See Cook *v.* Rogers, 7 Bing. 438; Davies *v.* Acocks, 2 C., M. & R. 461.

ference were the mere voluntary act of the debtor, or bonâ fide required by the creditor (*y*). If the transaction be otherwise bonâ fide, it is not impeachable because the property was delivered by the debtor secretly to save his credit before the world (*z*).

337. The circumstance that the creditor is the solicitor of the debtor does not (*a*) affect the question of fraudulent preference, except so far as it gives facilities for disguising a voluntary transaction under an appearance of demand and submission.

338. An assignment by the debtor of the whole, or of the whole with a colourable exception, of his property (otherwise than under the arrangement clauses of the Bankrupt Act) is an act of bankruptcy (*b*); which is also the effect of an assignment of so much of the property, that the trader is, or by the enforcing of the mortgagee's remedies would be, prevented from carrying on his business, through a practical insolvency, or the loss of the necessary appliances (*c*). But if there be a real and substantial exception, and no fraud, the assignment will be good (*d*). And as the defeat of the creditors by means of the insolvency, and not the mere stoppage of the business, is the foundation of the act of bankruptcy, a security upon all the trader's property, so that it be in consideration of a proper advance or equivalent, may be good, as a transaction most beneficial to the creditors by enabling the debtor to carry on his business (*e*); a present and substantial advance of money being considered to place

(*y*) Van Casteel *v.* Booker, 18 L. J., N. S., Exch. 13; Mogg *v.* Baker, 4 M. & W. 348; Johnson *v.* Fesemeyer, 3 De G. & J. 13; 25 Beav. 88. See Hale *v.* Allnutt, 18 C. B. 505.

(*z*) Crosby *v.* Crouch, 11 East, 256.

(*a*) Johnson *v.* Fesemeyer, supra.

(*b*) Lindon *v.* Sharp, 6 Man. & G. 895; Stewart *v.* Moody, 1 C., M. & R. 777; Dutton *v.* Morrison, 17 Ves. 193; Ex parte Smith, 1 Ves. & B. 518; Ex parte Bailey, 3 De G., M. & G. 534; Ex parte Bland, 6 id. 757; Smith *v.* Cannan, 2 El. & Bl. 35.

(*c*) Stanger *v.* Wilson, 19 Beav. 626; Goodricke *v.* Taylor, 2 H. & M. 380; 2 De G., S. & J. 135; 10 Jur., N. S. 414; see Pennell *v.* Dawson, 18 C. B. 355.

(*d*) Pennell *v.* Reynolds, 11 C. B., N. S. 709; Smith *v.* Timms, 1 H. & C. 849; and see Hale *v.* Allnutt, 18 C. B. 505.

(*e*) Young *v.* Waud, 8 Exch. 221; Baxter *v.* Pritchard, 1 A. & E. 456; Rose *v.* Haycock, id. 460, n.; Hutton *v.* Cruttwell, 1 El. & Bl. 15; Bittlestone *v.* Cooke, 6 id. 296.

the matter on the same footing, as the exception from the assignment of a substantial part of the debtor's property (*f*); and the proportion of the advance to the value of the property pledged being considered in determining the bona fides of the pledge, but not being taken as conclusive evidence of fraud (*g*).

A power may be given to the assignee to carry on the trade of the debtor, provided it be subsidiary to the winding-up of his affairs, and was not given for the purpose of obtaining future profits (*h*). It seems that if the power were given with such an intention the deed will be avoided; which will also be the consequence if the exercise of the power would create a partnership between the persons who are to carry out the provisions of the deed (*i*).

339. The assignment will be bad if part of the consideration be a bygone debt, because it is in effect an assignment of the whole for the price of part (*k*): otherwise where the advance is for the benefit of the estate by relieving it from a charge already existing (*l*). But the discharge of an existing security may be fraudulent if made in contemplation of bankruptcy, where it would prevent an equal distribution of the property under the bankruptcy, although the creditor discharged, receiving only the money in place of a good security, derived no benefit from the payment: as where the mortgage was on the property of the bankrupt's wife, and the discharge of it was only for the advantage of her and the bankrupt (*m*).

340. Evidence may be given of the effect of the deed (*n*) where it does not in terms assign all the property of the debtor; and though all of it be assigned, the assignment may be good if the lender did not actually know, and had not, from the

(*f*) Per Willes, J., Pennell *v.* Reynolds, 11 C. B., N. S. 709.

(*g*) Per Erle, J., Graham *v.* Chapman, 12 C. B. 85.

(*h*) Janes *v.* Whitbread, 11 C. B. 406; Coates *v.* Williams, 7 Exch. 205.

(*i*) Owen *v.* Body, 5 A. & E. 28; and see Hickman *v.* Cox, 8 H. L. C. 268; 9 C. B., N. S. 4.

(*k*) Graham *v.* Chapman, Bittlestone *v.* Cooke, supra; Lacon *v.* Liffen, 33 L. J., Ch. 25, 315; 4 Gif. 75.

(*l*) Whitmore *v.* Claridge, 31 L. J., Q. B. 141; 33 id. 87.

(*m*) Marshall *v.* Lamb, 5 Q. B. 115; 13 L. J., N. S., Q. B. 75.

(*n*) Lindon *v.* Sharp, 6 Man. & G. 895.

nature of the transaction, notice that the object was to defeat and delay the creditors of the assignor (*o*).

341. Under the statute 27 Eliz. c. 4, which includes copyholds (*p*), but not personal estate (*q*), a conveyance which is made only for good, and not for valuable consideration, is voluntary (*r*), and, because voluntary, fraudulent against a subsequent purchaser for valuable consideration (which includes a mortgagee), even though he had notice of the voluntary conveyance (*s*). And if a mortgage be made secretly, to defeat other claimants (*t*), or a settlor reserve an unlimited power to mortgage (*u*), or to make leases for any term, with or without rent (*x*), or if he continue in possession and sell part of the property of his own authority, or if he sell under a power and receive the purchase-money, though the settlement direct that it shall be applied to the like uses as the settled estate (*y*); in any of these cases the assurance is considered to be fraudulent, and can no more be taken advantage of by an assignee, though he have no notice of the claims of the persons against whom it was declared void, than by the original mortgagee (*z*).

The purchaser under the first deed may, however, show by sufficient evidence of the inadequacy of the consideration, that the second deed was only colourable (*a*), and the instrument will be good as against the grantor (*b*).

342. The mortgage of a tenant in tail is valid against volunteers, because he is able to acquire the fee (*c*).

(*o*) Per Willes, J., Pennell *v.* Reynolds, 11 C. B., N. S. 709; In re Colemere, L. R., 1 Ch. App. 128.

(*p*) Doe *d.* Tunstill *v.* Bottriell, 5 B. & Ad. 131; Currie *v.* Nind, 1 M. & C. 17.

(*q*) Bill *v.* Cureton, 2 M. & K. 503.

(*r*) Goodright *d.* Humphreys *v.* Moses, 2 W. Bl. 1019.

(*s*) Doe *d.* Ottley *v.* Manning, 9 East, 58; Chapman *v.* Emery, Cowp. 278; Doe *d.* Parry *v.* James, 16 East, 212.

(*t*) Lloyd *v.* Attwood, 3 De G. & J. 614; 5 Jur., N. S. 1323.

(*u*) Tarback *v.* Marbury, 2 Vern. 510.

(*x*) Lavender *v.* Blakstone, 2 Lev. 146.

(*y*) Evelyn *v.* Templar, 2 Bro. C. C. 148.

(*z*) Lloyd *v.* Attwood, 3 De G. & J. 614; 5 Jur., N. S. 1323.

(*a*) Doe *d.* Parry *v.* James, 16 East, 212.

(*b*) Smith *v.* Garland, 2 Mer. 123.

(*c*) Cormick *v.* Trapand, 6 Dow, 60, under the Irish Act 10 Car. 1, sess. 2, c. 3, in pari materiâ with the English statutes of Elizabeth.

343. It has been held at law, that an equitable mortgagee by deposit, having only a right to go to equity for a legal conveyance, is not a purchaser within the act of 27 Eliz. (*d*). But in equity it is considered (*e*) that the purchaser of an equitable estate ought to be no more affected by a voluntary conveyance than the purchaser of a legal estate, and, therefore (*f*), a mortgagee, by deposit of title deeds, with an undertaking to execute a legal mortgage (or, it is conceived, without such an undertaking), is a purchaser within the statute (**42, 953**).

344. To enable the subsequent purchaser to set aside the fraudulent deed, it is not necessary that both deeds should have been made by the same person. The purchaser from the heir of the maker of the voluntary deed may set it aside, whether the heir knew of it or not (*g*). And if there be fraud in a transaction to which an insolvent or bankrupt was party, his assignees, who represent the creditors, may take advantage of it (*h*).

345. A mortgage deed has been held to be well delivered where, after execution, it was given by the debtor to his own attorney, who, although he immediately gave notice of it to the prior mortgagees, did not deliver it to those in whose favour it was made until after the bankruptcy of the mortgagor (*i*).

346. The possession and reputed ownership by the debtor of chattels after an alleged absolute assignment by him, or after they have been taken in execution by the creditor, has, from an early period, been treated (*k*) as a fraud against creditors, because possession is the chief test of the ownership of chattels, and by means of it the debtor acquires a credit to which his real circumstances do not entitle him (**29, 1086**). This inference of fraud also arises as to real estate, when the assignor retains the possession of the title deeds (*l*).

(*d*) Kerrison *v.* Dorrien, 9 Bing. 76.
(*e*) Buckler *v.* Mitchell, 18 Ves. 100.
(*f*) Lister *v.* Turner, 5 Hare, 281.
(*g*) Burrel's case, 6 Rep. 72.
(*h*) Doe *d.* Grimsby *v.* Ball, 11 M. & W. 531.
(*i*) Grugeon *v.* Gerrard, 4 Y. & C. 119.
(*k*) Twyne's case, 3 Rep. 80; West *v.* Skip, 1 Ves. 245.
(*l*) Doe *d.* Grimsby *v.* Ball, 11 M. & W. 531; and see Perry Herrick *v.* Attwood, 2 De G. & J. 21.

By several bankrupt and insolvent acts, which have been since repealed, goods so remaining in the possession of the debtor as reputed owner, by the consent of the true owner, became vested in or subject to the powers of the assignees. And by the Bankrupt Law Consolidation Act, 1849 (*m*), the Court of Bankruptcy has power to sell and dispose of, for the benefit of the creditors, all goods and chattels which, at the time of the bankruptcy, were, by consent and permission of the true owner, in the possession, order or disposition of the bankrupt as reputed owner, or whereof he had taken upon himself the sale, alteration or disposition as owner, with an exception as to duly registered transfers or assignments of ships, or shares of ships, as security for debts, by way of mortgage or assignment.

347. There is a difference in the construction of the statute of Elizabeth and the Bankrupt Act in respect of the apparent ownership of chattels. The former, being intended to prevent impediments to judgments in favour of creditors, applies only to such chattels as can be the subjects of execution; whereas the Bankrupt Act, which is intended to prevent deceit from apparent ownership, refers to intangible as well as tangible property (*n*).

348. Possession by the assignor is not however considered to be fraudulent, where delivery to the assignee would be inconsistent with the terms or object of the transaction. If the deed be conditional, the vendor's continuance in possession will not avoid it, because the vendee is not to have possession till he has performed the condition. A mortgage or bill of sale will therefore stand (*o*) though the mortgagor retain possession of the property assigned; and if a mortgage deed be duly executed and not delivered as an escrow, the mere retainer of it without fraud by the grantor will not avoid it although it be made secretly (*p*).

(*m*) 12 & 13 Vict. c. 106, s. 125.

(*n*) Ex parte Foss, 2 De G. & J. 230; but see 2 De G., M. & G. 240.

(*o*) Edwards *v.* Harben, 2 T. R. 587; Martindale *v.* Booth, 3 B. & Ad. 498; Meggott *v.* Mills, 1 Raym. 286; and see Cadogan *v.* Kennett, Cowp. 432; Reed *v.* Wilmot, 7 Bing. 577.

(*p*) Exton *v.* Scott, 6 Sim. 31.

349. Nor is it an objection to the validity of the deed that the debtor is allowed by the assignee to remain in the apparent possession of and to use the property where the ownership and actual possession of it is notorious (*q*); nor as between the contracting parties that the assignee lends the goods or lets them on hire to the debtor, if they were publicly purchased and a bill of sale was taken from the sheriff (*r*); nor that the debtor retains the actual possession by agreement for a temporary purpose and as the servant of the assignee (*s*); though the latter cannot complete his title by making the assignor his agent *for the purpose* of taking and holding possession (*t*). The assignor may also retain the possession when the subject of the assignment is a chattel annexed to the land, and as such distinguishable from goods of which the property usually accompanies the possession (**35**); or when the assignee cannot conveniently obtain possession (*u*). Neither is the possession of the assignor fraudulent where he is tenant in common with the purchaser, because the possession of one tenant in common is the possession of all (*x*).

350. It is unnecessary that the assignment of the chattels should be followed by possession, in order to make it valid against the assignor himself, or against his creditors who are cognizant of and take part in the arrangement under which it is made, or which proceeded upon the assumption of its validity; or against strangers (*y*); though it seems that a stranger may afterwards become a creditor under such circumstances that he will have an equity to set aside the assignment (*z*). And a merely fictitious sale without assignment,

(*q*) Latimer *v.* Batson, 4 B. & C. 652; see Leonard *v.* Baker, 1 M. & S. 251.

(*r*) Kidd *v.* Rawlinson, 3 B. & P. 59; Watkins *v.* Birch, 4 Taunt. 822; see Jezeph *v.* Ingram, 8 id. 838.

(*s*) Reeves *v.* Capper, 5 Bing. N. C. 136.

(*t*) Holroyd *v.* Marshall, 10 H. L. C. 191.

(*u*) Steward *v.* Lombe, 1 Bro. & B. 506.

(*x*) In re Mathews, 1 Atk. 185.

(*y*) Steel *v.* Brown, 1 Taunt. 381; Robinson *v.* M'Donnell, 2 B. & Al. 134; Bessey *v.* Windham, 6 Q. B. 166; White *v.* Morris, 11 C. B. 1015; Olliver *v.* King, 8 De G., M. & G. 110.

(*z*) See per Sir T. Plumer, Richardson *v.* Smallwood, Jac. 556; per Sir W. P. Wood, Holmes *v.* Penney, 3 K. & J. 100.

made to avoid an execution, and resting only upon a receipt for money and a delivery of the goods, will not pass the property in them, and may be avoided even by the debtor (*a*).

351. The assignment will also be good against the assignees in bankruptcy of the assignor, if the property be beyond sea, as in the case of ships in a foreign port, so long as by reason of absence immediate possession cannot be taken (*b*); the delivery of the indicia of ownership being in the meantime sufficient. The same rule applies to an unfinished chattel, which having been appropriated as the property of the assignee by payment of part of the price or other equivalent, is left in the assignor's possession during a reasonable time for completion or repair (**31**). Such is an unfinished ship in the yard of the builder (*c*); and the right of the assignee will not be affected by a particular custom of the assignor to build ships for sale on his own account (*d*).

352. But except in such cases as these, the law will not allow the mortgagee to hold chattels or choses in action, of which the mortgagor has been left in possession, as against his assignees in bankruptcy; who, notwithstanding the assignment, are entitled to consider the property as within the order and disposition of the bankrupt as reputed owner, whether he acquired possession at the time of the mortgage or by a subsequent redemise (*e*).

353. Where the vendor of goods in whose hands the documents of title are left by the purchaser pledges them and becomes bankrupt, they are not in his possession within the act, because he cannot obtain them without paying the pledgee's debt (*f*).

(*a*) Bowes *v.* Foster, 2 H. & M. 779.

(*b*) Atkinson *v.* Maling, 2 T. R. 462; Brown *v.* Heathcote, 1 Atk. 185; Ex parte Batson, 3 Bro. C. C. 362.

(*c*) Woods *v.* Russell, 5 B. & Ald. 942; Clarke *v.* Spence, 4 Ad. & El. 448; Holderness *v.* Rankin, 28 Beav. 180; 2 De G., F. & J. 258; Swainston *v.* Clay, 4 Gif. 187.

(*d*) Holderness *v.* Rankin, supra.

(*e*) Ryall *v.* Bowles, 1 Ves. 348; 1 Atk. 165; Lingham *v.* Biggs, 1 B. & P. 82; Bryson *v.* Wylie, id. 83, note; Freshney *v.* Carrick, 1 H. & N. 653; Hornsby *v.* Miller, 5 Jur., N. S. 938; Spackman *v.* Miller, 12 C. B., N. S. 659; 9 Jur., N. S. 50.

(*f*) Greening *v.* Clark, 4 B. & C. 316.

Of Securities obtained by Misrepresentation, Extortion or undue Influence.

354. Another kind of imperfection in securities will arise where the security has been obtained from the mortgagor by representations which to the mortgagee's knowledge were erroneous; as in the case of a security for a debt for which the mortgagee untruly represented that he was liable as the mortgagor's surety, although the representation was made without an improper motive (*g*). Or if the security contain extortionate provisions, from the effect of which the Court of Chancery relieves the mortgagor upon equitable terms, where the mortgagee has either exacted unconscionable advantages, or has improperly clogged the right of redemption (**488**).

355. In the exercise of this jurisdiction the Court formerly interfered with an oppressive kind of security called a Bristol bargain, by which the debt and interest were to be repaid by instalments, at the rate of 20*l.* per annum for seven years for every 100*l.* advanced, up to which point the security was allowed, the rate of interest being then 6*l.* per cent. But when it was attempted to increase the number of annual instalments to eight, it was declared that the agreement was against conscience, and that if allowed it might be carried on without stint or bounds; and redemption was decreed on the usual terms of paying principal and interest (*h*). And Sir John Power, M.R., said he thought the Court would relieve against an ordinary Bristol bargain, viz., the repayment by seven yearly instalments (*i*).

356. This jurisdiction was partly founded upon the laws against usury (**1689**), and therefore did not apply to mere cases of excessive interest, in which extraordinary risk was incurred; which always justified, as it still justifies, the taking a security for interest beyond the usual rate, and even for a much larger principal sum than was really lent (*k*).

But having regard to the power which the mortgagee has

(*g*) Lake *v.* Brutton, 8 De G., M. & G. 441.

(*h*) James *v.* Oades, 2 Vern. 402.

(*i*) Fulthrope *v.* Foster, 1 Vern. 477.

(*k*) Potter *v.* Edwards, 26 L. J., N. S., Ch. 468.

acquired by the repeal of the usury laws, of demanding any amount of interest, the repeal of those laws, far from lessening the power of the court over oppressive securities, has rather increased the occasion for its exercise, both in respect of securities taken from expectant heirs or reversioners (*l*); and in ordinary mortgages, where the mortgagee attempts to get a collateral advantage beyond his mere principal and interest; as by stipulating for commission or for a bonus in case of sale, or by making other exactions beyond the usual terms of the contract (*m*) (**1621, 1663**).

357. Another form, in which mortgagees have attempted to gain an undue advantage, has been by means of a long lease by the mortgagor at a fixed rent (**1581**). It was, or is said to have been, the opinion of Lord Redesdale, that such a transaction would not be allowed (*n*). But although he said (*o*) it was the general impression that a lease by the mortgagor to the mortgagee could not stand, the parties not being able to deal upon equal terms, he said also that the person redeeming was to have the estate re-conveyed free from any incumbrance by the mortgagee, (which he seemed to think would apply by reason of pressure to a lease obtained from the mortgagor); and that the effect of the lease would be to leave the mortgagee an advantage to himself after payment of his principal, interest and costs. Whence it seems evident that Lord Redesdale was speaking of such a lease as that upon the validity of which he was then deciding, viz., a lease for 999 years, at a rent no higher than would be reserved under a common occupation lease, and which was in effect, as he said, a departure with the inheritance (*p*). He observed also upon the distinction between such a lease and a lease for twenty-one years at a fair value, or a term in the nature of an occupation lease. And in a somewhat earlier case (*q*),

(*l*) Per Turner, L. J., Croft *v.* Graham, 2 De G., J. & S. 155.

(*m*) Broad *v.* Selfe, 9 Jur., N. S. 885; Barrett *v.* Hartley, L. R., 2 Eq. 795.

(*n*) See Morony *v.* O'Dea, 1 Ba. & Be. 109.

(*o*) Webb *v.* Rorke, 2 Sch. & Lef. 661.

(*p*) See also the remarks of Lord Eldon and Lord Redesdale in the like case of Hickes *v.* Cooke, 4 Dow, 17.

(*q*) Gubbins *v.* Creed, 2 Sch. & Lef. 214.

Lord Redesdale is reported to have said, that in the simple case of a mortgagor giving a lease to a mortgagee, there was perhaps no ground to impeach the lease; but that the court would look with great jealousy upon any thing more, and that if the mortgagee took advantage of the distress of the mortgagor, or the latter made the lease in consideration of forbearance, it would be bad. So that upon considering the whole tendency of Lord Redesdale's remarks, it can hardly be said that Lord Manners differed from him judicially (*r*) when he upheld a lease made by a mortgagor to a mortgagee, at a fair rent, for a period, at first of twenty-one years, and afterwards by renewal for a somewhat longer time, but with a proviso making it void upon payment of the mortgage money, the mortgagee afterwards offering upon payment to give up the lease.

In another case in Ireland, before Lord St. Leonards, a prior mortgagee, who had obtained leases subsequent to the *puisne* mortgage, was charged as a mortgagee in possession, and not as lessee; upon the principle that the rights of the *puisne* mortgagee against the estate could not be affected after the date of his security by any dealing between the mortgagor and the first mortgagee; but no question was raised as to the validity of the leases (*s*).

A lease by the mortgagor to the mortgagee will not be set aside when the value of the property has become changed by the lapse of many years since the making of the lease (*t*).

358. Securities for which there was an inadequate or no consideration, and between the parties to which such a fiduciary or other relation existed, that the maker of the security may be assumed to have been misled, unable to form a correct judgment, or under the influence of the person in whose favour it was made, are liable to be set aside by courts of equity, or to be treated only as securities for so much

(*r*) Morony *v.* O'Dea, 1 Ba. & Be. 109. Lord Manners clearly thought he was differing from Lord Redesdale; but perhaps he thought so from an imperfect knowledge of the case of Webb *v.* Rorke, which was not then reported.

(*s*) Gregg *v.* Arnott, Ll. & G. t. Sugd. 246.

(*t*) Hickes *v.* Cooke, 4 Dow, 17.

money as can be proved to have been advanced with interest at a reasonable rate.

When therefore an inadequate consideration (which alone gives no title to relief (*u*)), is given to a person who is of weak intellect, or subject to the influence which arises out of the relation of parent and child, or guardian and ward, or other like pressure (even though the actual relation may be at an end (*x*)), in a transaction with the person under whose influence he is or is supposed to be, or who by reason of a superior knowledge of the property or other circumstances is likely to have an advantage over him, he is entitled (*y*) to be relieved from the consequences; and it is for the other party to show that the grantor had such independent professional advice, that he could exercise a proper judgment, and was not misled by artifice or contrivance, the existence of which any false recital or suggestion in the security will tend to show (*z*).

359. The same equity is applied to contracts entered into by heirs, or other persons concerning their future or reversionary interests; as to which the Court of Chancery has gone far beyond the original principle of protecting young and improvident persons, whose expectations make them liable to imposition (*a*): insomuch that, according to the present doctrine of the court in case of an inadequate consideration, a sale will be cut down to a security, and a security reduced to a mortgage for the actual advance, with interest at the rate usually allowed in such cases by the court, although the expectant heir with whom the transaction was made was of full, and even of mature age, and was independently advised, and

(*u*) Harrison *v.* Guest, 6 De G., M. & G. 424; 8 H. L. Ca. 481.

(*x*) Hylton *v.* Hylton, 2 Ves. 547.

(*y*) Spencer *v.* Chase, 9 Mod. 29; Maitland *v.* Irving, 15 Sim. 437; Maitland *v.* Backhouse, 16 id. 58; Archer *v.* Hudson, 7 Beav. 551; Kay *v.* Smith, 21 id. 523; Espey *v.* Lake, 10 Hare, 260; King *v.* Savery, Savery *v.* King, 1 Sm. & G. 271; 5 H. L. C. 627; Longmate *v.* Ledger, 2 Gif. 157; Harrison *v.* Guest, supra.

(*z*) Baker *v.* Bradley, 7 De G., M. & G. 597.

(*a*) See remarks of Lord Hardwicke in Walmesley *v.* Booth, 2 Atk. 27. The interest of a tenant for life whose estate is subject to annuities and to the interest upon mortgages, is not a reversionary interest within the scope of this doctrine. (Webster *v.* Cook, L. R., 2 Ch. App. 542.)

understood the nature of the bargain (*b*). The onus of showing that it was reasonable and provident is also thrown upon the purchaser or mortgagee, and not the contrary upon the grantor (*b*): and the doctrine of the court is not affected by the repeal of the usury laws (*c*) (**356**).

The principle does not apply to a settlement made by an expectant heir upon his wife and children, although it be alleged to have been obtained on their behalf by undue influence (*d*).

360. Where the transaction takes the form of a sale, the conveyance will be directed to stand as a security for the amount actually found due, with interest, and in ordinary cases with costs, on the footing of a mortgage (*e*) (**1693**); and as in the case of a mortgage, the refusal of a tender of all that the person who dealt with the heir was entitled to receive, will be visited with an order that he shall pay the costs of the suit (*f*) (**1706**).

361. A security under the like circumstances will be ordered to stand for the sums actually advanced to, or for the benefit of, the owner of the expectancy. But where the case is tainted with fraud and misrepresentation, and it is not shown that the money was applied for the plaintiff's benefit, the security may be set aside unconditionally (*g*). The defendant, however, will generally, so far as subsequent events will permit, be placed in the same position as if the transaction had not taken place (*h*).

362. Solicitors also take securities from their clients under the restraints which are applied by courts of equity in other cases, as a check upon the exercise of undue influence; the relation between solicitors and their clients being so easily abused to the advantage of the former, that they are not

(*b*) Davis *v.* Duke of Marlborough, 2 Sw. 139; Emmet *v.* Tottenham, 10 Jur., N. S. 1090; 12 L. T., N. S. 838; Bromley *v.* Smith, 26 Beav. 644; 5 Jur., N. S. 833.

(*c*) Per Turner, L. J., Croft *v.* Graham, 2 De G., J. & S. 155; Emmet *v.* Tottenham, 12 L. T., N. S. 838.

(*d*) Shafto *v.* Adams, 4 Gif. 492; 10 Jur., N. S. 121.

(*e*) Peacock *v.* Evans, 16 Ves. 512; Davis *v.* Duke of Marlborough, 2 Sw. 139, note; Sugd. V. & P. 326, ed. 11; 286, ed. 14.

(*f*) Emmet *v.* Tottenham, supra.

(*g*) Kay *v.* Smith, 21 Beav. 523.

(*h*) Savery *v.* King, 5 H. L. C. 627.

allowed to deal upon the same footing as other persons. And although during the continuance of the relation the lapse of time may be a matter for consideration, it is said that the same weight is not due to it as when the relation does not subsist (*i*).

Hence, if a solicitor purchase or obtain a benefit from his client, the solicitor is bound to show that he has taken no advantage of his professional position, but has given every information and advice, and has protected the client's interests in the same manner as if he had dealt with a stranger; in default of proof whereof the deed will only stand as a security for the amount found to be due (*k*); and a gift or security for a gift pending the relation is absolutely void (*l*).

363. An assignment of the subject matter of a suit by the client to his attorney, pendente lite, is good both at law and in equity, where it is made by way of security, because it is likely to be beneficial to the client (*m*), although a sale of such an interest is void at law for champerty or maintenance (*n*), and in equity will stand only as a security for the money advanced (*o*).

364. The rules of equity as to securities given by the client, require that the debt secured shall have been advanced, or shall otherwise be actually due; that the amount, if not ascertained at the time, shall be capable of being ascertained (the onus of the inquiry being on the solicitor), and that there be no unusual provisions by which the client may be injured or kept in the solicitor's hands. And if any greater advantage be given to the solicitor than the law would give him (such as interest on his costs) (*p*), then that the client should first have been informed of his rights.

(*i*) Per Turner, L. J., 4 De G. & J. 96.

(*k*) Cane *v.* Allen, 2 Dow, 289; Gibson *v.* Jeyes, 6 Ves. 266; Higgins *v.* Joyce, 2 J. & L. 282; King *v.* Savery, 1 Sm. & G. 271; 5 H. L. C. 627; Welles *v.* Middleton, 1 Cox, 112; Holman *v.* Loynes, 18 Jur. 843; Montesquieu *v.* Sandys, 18 Ves. 313; Tomson *v.* Judge, 3 Dr. 306; and see Gresley *v.* Mousley, 1 Gif. 450; 4 De G. & J. 78; 5 Jur., N. S. 583.

(*l*) Newman *v.* Payne, 2 Ves. J. 199; 4 Bro. C. C. 350.

(*m*) Anderson *v.* Radcliffe, E., B. & E. 816; Wood *v.* Downes, 18 Ves. 120.

(*n*) Simpson *v.* Lamb, 7 E. & B. 84.

(*o*) Wood *v.* Downes, supra.

(*p*) Lyddon *v.* Moss, 5 Jur., N. S. 637.

365. Where no objection arises upon these grounds the security will be valid; and even where the consideration is money due on an account, if the account have been properly investigated and settled between the parties, the mortgage will not be disturbed, nor the solicitor restrained in the exercise of his remedies (*r*).

366. Nor will the security be invalid where the debt is bonâ fide, because (*s*) it was made under pressure from the solicitor, or included in a security for other money obtained to relieve the urgent necessities of the mortgagor. If the security be oppressive in form, as by an unreasonable postponement of the time for redemption, the mortgagor will have the same rights as if the common form of security had been used; and where there has been concealment or misrepresentation in obtaining or framing the security, the mortgage will be valid only for so much as on taking the accounts shall appear to be actually due (*t*). The same rule is observed both as to legal and equitable securities for costs or advances the amount of which has not been fixed, or where bills for the costs have not been delivered (*u*). The amount due on such securities for costs will be ascertained by taxation. But where several years had elapsed after the relation of solicitor and client had ceased, and no fraud or special error being alleged, taxation had been offered, and the client had enjoyed a benefit under the security, the accounts were not opened though no bills were delivered till after the date of the mortgage (*x*).

367. The client cannot set up in answer to a suit to fore-

(*r*) Judd *v.* Olland, 5 Jur., N. S. 755; Jones *v.* Roberts, 9 Beav. 419; see Nelson *v.* Booth, 5 W. R. 722.

(*s*) Johnson *v.* Fesemeyer, 25 Beav. 88; 3 De G. & J. 13; Pearson *v.* Benson, 28 Beav. 598; Cheslyn *v.* Dalby, 2 Y. & C. 170.

(*t*) Cowdry *v.* Day, 1 Gif. 316; Dunstan *v.* Paterson, 11 Jur. 96; Thomas *v.* Lloyd, 3 Jur., N. S. 288.

(*u*) Newman *v.* Payne, 2 Ves. J. 199; 4 Bro. C. C. 350; Harrison *v.* Wiltshire, 2 Jur. 679; Davies *v.* Parry, 1 Gif. 174; Bristow *v.* Warner, as to equitable security notwithstanding Ex parte Bovill, 2 M. & A. 382, n. See Philby *v.* Hazle, 29 L. J., C. P. 370.

(*x*) Blagrave *v.* Routh, 2 K. & J. 509; 3 Jur., N. S. 399. But it seems that something equivalent to affirmance is necessary, besides lapse of time; unless perhaps the bare acquiescence were for a very long period. (Lyddon *v.* Moss, 5 Jur., N. S. 637.)

close a mortgage, or to an action on a note or other security which he has given for costs, the provision of the Solicitors' Act, 6 & 7 Vict. c. 73, s. 37, which requires delivery of the bill a month before action brought; the statute being inapplicable to an action on the security (*y*).

368. As to securities for costs not yet incurred, they are absolutely void, no distinction being made between future cash advances and fees for business to be done (*z*); and being void as contrary to public policy they cannot afterwards be confirmed by the acts of the parties, though a valid security may be given after the costs have been incurred (*a*). Where, however, an existing debt is included in a security for future costs, the security will be good as to the debt, if it be shown that the debt was due; for in the absence of such proof it seems that the whole security will fail (*b*).

The rule against security for future costs does not prevent a trustee from agreeing with his solicitor that whatever costs may be properly due to the latter for business in respect of the trust estate shall be paid out of it when it becomes available, and not by the trustee personally (*c*).

Of Securities which are affected by the Nature of the Consideration; and herein of immoral Securities.

369. A security which is given for an immoral consideration is void both at law and in equity. The common example of this kind of security is where a mortgage or annuity bond or deed is given to a woman in consideration of illicit intercourse with the grantor or obligor.

The instrument is void where the consideration, whether performed or not, is wholly or in part for future illicit inter-

(*y*) Thomas *v.* Cross, 10 Jur., N. S. 1163; Jeffreys *v.* Evans, 14 M. & W. 210.

(*z*) Booth *v.* Creswicke, 8 Jur. 323; Jones *v.* Bland, 1 Dow, P. C. 462; Pitcher *v.* Rigby, 9 Price, 79; Uppington *v.* Bullen, 2 Dr. & War. 184. See in bankruptcy Ex parte Wake, 2 Dea. 349.

(*a*) Willens *v.* Tandy, 5 Ir. Eq. R. 1.

(*b*) Holdsworth *v.* Wakeman, 1 Dow, P. C. 532; Jones *v.* Tripp, Jac. 322; Williams *v.* Piggott, id. 598; Ex parte Laing, 2 M. & A. 381; Ex parte Wake, 3 M. & A. 329.

(*c*) Parsons *v.* Spooner, 5 Hare, 102.

course, or for giving facilities for obtaining or carrying it on (*d*). Where the security is given as a consideration for past cohabitation or during its continuance, either simply or in such a form as to induce the woman to put an end to rather than to continue the connection, it will be good, though the connection continue after the date of the security, unless it be shown that the continuance was the real consideration (*e*). Distinctions which appear to have been made in earlier cases, where the consideration was præmium pudicitiæ and where a party to the immoral contract came for relief, have been dropped (*f*). A party to the contract may now be relieved against it; but he will fail if his case be mixed up with complaints, contaminated with the original immoral purpose (*g*); and relief will not be given in equity where the illegal consideration is so apparent on the face of the document that it would be held void at law, independently of the statements in the bill (*h*).

370. Securities given as a reward for procurement of marriage (commonly called *marriage brocage*) with a particular person, are also void, as contrary to that freedom of choice in marriage which is encouraged by public policy. Such securities may be ordered to be delivered up, and sums already paid under them to be returned (*i*); and it is said that if they are at all capable of confirmation, it can be only done with a particular knowledge of the circumstances, and not by a general release of the remedy against them (*k*). This rule, however, does not necessarily invalidate an agreement made by both the persons about to marry, to pay to another

(*d*) Gray *v.* Mathias, 5 Ves. 286; Bullmore *v.* Willyams, 32 Beav. 574; 9 Jur., N. S. 1115; Sismey *v.* Eley, 17 Sim. 1.

(*e*) Gray *v.* Mathias, supra; Hill *v.* Spencer, Ambler. 641; Dillon *v.* Jones, cited 5 Ves. 291; Gibson *v.* Dickie, 3 M. & S. 463; Hall *v.* Palmer, 3 Hare, 532.

(*f*) Priest *v.* Parrot, 2 Ves. 160; Bainham *v.* Manning, 2 Vern. 241; Matthews *v.* Hanbury, 2 Vern. 187; Bullmore *v.* Willyams, supra; but see Sismey *v.* Eley, supra.

(*g*) Batty *v.* Chester, 5 Beav. 103.

(*h*) Smythe *v.* Griffin, 13 Sim. 245.

(*i*) Drury *v.* Hooke, 1 Vern. 411; Stribblehill *v.* Brett, 2 Vern. 445; Smith *v.* Brunning, id. 392; see Smith *v.* Aykwell, 3 Atk. 566.

(*k*) Shirley *v.* Martin, 3 P. W. 74, n. Per Lord Hardwicke, Cole *v.* Gibson, 1 Ves. 506.

a sum of money upon their marriage, because the circumstances negative the presumption that any imposition has been practised against either of them (*l*).

371. The same policy invalidates securities made as a reward for the use of influence over any person, to induce him to dispose of his estate for the benefit of the maker of the security. But in this, as in some cases of marriage brocage securities, it may be that the plaintiff will not have costs, because he is particeps criminis (*m*).

372. Upon the same principle of public policy, securities given for obtaining or for procuring the sale of a public office of trust are void, whether the office be or be not one the sale of which is forbidden by statute (*n*) (**385**).

373. By the statute of 16 Car. 2, c. 7, s. 3, no payment of a sum of money exceeding 100*l.* lost at gaming on ticket or credit could be compelled; and all securities for satisfaction of such money were declared void. And by 9 Anne, c. 14, s. 1, all notes, bonds, judgments, mortgages or other securities, the whole or part of the consideration of which was money or other valuables won by gaming, or playing at or betting on any games, or for the repayment of money knowingly lent for such gaming or betting, or at the time or place of such play to any person gaming or betting, were declared void. And where such mortgages or securities were of or affected lands, tenements or hereditaments, the mortgages or securities were to enure for the benefit of the persons who should have or be entitled to the hereditaments in case the grantor or person incumbering the same had been dead, and as if the securities had been made to the persons next entitled after the decease of the person so incumbering the same. But to remedy the injustice done to purchasers for valuable consideration of such securities, without notice of the original consideration, it was enacted by 5 & 6 Will. 4, c. 41, that so much of the above-mentioned and of several earlier acts (including the Bankrupt Act, 6 Geo. 4, c. 16, s. 125) as declared that any notes, bills or mortgages should be void, together

(*l*) Per Lord Hardwicke, 1 Ves. 507.
(*m*) Debenham *v.* Ox, 1 Ves. 276.
(*n*) Law *v.* Law, 3 P. W. 391; Stackpole *v.* Earle, 2 Wils. 133.

with the enactment in favour of the persons next entitled, should be repealed; but every note, bill or mortgage which by virtue of the partly repealed acts would have been void, was to be taken to have been made for an illegal consideration. And if any person should pay to an indorsee, holder or assignee of such note, bill or mortgage, the whole or part of the amount thereby secured, the money was to be taken to have been paid on account of the person to whom the security was given upon such illegal consideration, and to be a debt due and recoverable by action from him, to the person who should have paid the money. Money paid in respect of an illegal security may be recovered under this statute, either on debt or assumpsit, and if the security be given for interest as well as principal the interest is also recoverable (*o*).

374. By 8 & 9 Vict. c. 109, the unrepealed parts of the acts of Charles 2 and of Anne, and other acts, were repealed; and all contracts or agreements by parol or in writing by way of gaming or wagering were declared void. And it was enacted that no suit should be brought in any court of law or equity to recover any money or valuable alleged to be won upon wager, or which should have been deposited to abide the event of a wager, save as to subscriptions to prizes for the winner of any lawful game (*p*).

375. It has been intimated, that the bonâ fide assignee (without notice of the illegal consideration) of a bond, and consequently of the other forms of security mentioned in the statute of Anne, but not expressly mentioned in that of Will. 4, is within the equity of the latter statute (*q*). And that the contract as well as the security for money (*r*) won at play was avoided by the latter, or at all events by the combined effect of the two statutes.

376. It appears, however, that if in an action for money the illegality of the contract under 8 & 9 Vict. c. 109, be not set up, an adverse judgment obtained in the action cannot be

(*o*) Gilpin *v.* Clutterbuck, 13 L. T. 71, 159.

(*p*) Sects. 15, 18.

(*q*) Hawker *v.* Hallewell, 3 Sm. & G. 194.

(*r*) Applegarth *v.* Colley, 10 M. & W. 723. And see as to the Statute of Anne, Young *v.* Moore, 2 Wils. 67.

impeached; for the statutes of Charles and Anne did not affect an adverse judgment, or even a cognovit given in an adverse action (*s*). And the act of Will. 4 only dealt with such securities as were avoided by these statutes; while the statute of Victoria avoids only contracts or agreements, which, as appears above, do not include securities obtained adversely.

377. By 18 Geo. 2, c. 34, courts of equity were specially empowered to proceed and decree upon suits brought to enforce payment under transactions contrary to the statute of Anne; and in several cases have accordingly given relief, by ordering the delivery up of securities, as well where they were given directly for the gaming debt as where they were given abroad in exchange for the original gaming securities, and where they were given after the completion of the first transaction (*t*).

378. The statute of Anne enacted (*u*), that persons liable to be sued for money or valuables, under the statute, should be compelled to give discovery. But the plaintiff was bound to separate matters in respect of which he was entitled to an answer from those which the defendant was not bound to answer. If this were not done, the defendant was not bound to answer any of the matters (*x*). The repeal by 8 & 9 Vict. c. 109, of the act of Anne, and of that part of the act of Geo. 2 which relates to it, appears to leave the matter subject to the general rules of courts of equity concerning answers which would expose a defendant to criminal prosecution.

379. The Bankruptcy Act, 1861, provides (*y*) that any contract, covenant or security, made or given by a bankrupt or other person with, to or in trust for any creditor, for securing the payment of any money as a consideration, or with intent to persuade the creditor to forbear opposing the order for discharge, or petitioning for a rehearing of or

(*s*) Lane *v.* Chapman, 11 Ad. & El. 966, 980; and see Coote, Mort. Bk. 5, Ch. 2.

(*t*) Newman *v.* Franco, 2 Anst. 519; Andrews *v.* Berry, 3 id. 634; Rawden *v.* Shadwell, Ambl. 269; Wynne *v.* Callandar, 1 Russ. 293; Parker *v.* Alcock, Younge, 361.

(*u*) Sect. 3.

(*x*) Earl Lichfield *v.* Bond, 6 Beav. 88.

(*y*) 24 & 25 Vict. c. 134, s. 166.

appealing against the same, shall be void; and any money thereby secured or agreed to be paid shall not be recoverable, and the party sued on any such contract or security may plead in general that the cause of action accrued pending proceedings in bankruptcy, and may give the act and the special matter in evidence: provided always, that no such security, if a negotiable security, shall be void as against a bonâ fide holder thereof for value, without notice of the consideration for which it was given.

380. Securities generally of this kind, as forbidden by the Bankrupt Act, 6 Geo. 4, c. 16, s. 125, were included in the act 5 & 6 Will. 4, c. 41, above referred to (**373**), and were thereby made good in the hands of innocent holders. The corresponding provisions in the bankruptcy acts 5 & 6 Vict. c. 122, s. 40, and 12 & 13 Vict. c. 106, s. 202, contained provisions in favour of innocent holders, and the act of 1861, as we have seen, applies to innocent holders of negotiable securities only. It seems, therefore, that no other securities are now protected in the hands of innocent holders, although the general protection given by the statute of 5 & 6 Will. 4 appears, at least till the passing of the act of 1861, to have been lost only by the substitution of another bankrupt act in the place of that to which the statute of Will. 4 was expressly made applicable.

381. Securities for the payment of money to persons who would be injured by the passing of a private bill through parliament, in consideration of the withdrawal of their opposition to the bill, are not illegal (*z*).

382. A debt arises by robbery, from the robber to the person robbed; and though the civil remedy of the latter be suspended until the conviction of the offender, the debt is a good consideration for a security made by him before that event for the sum stolen (*a*).

383. A security given in consideration that the grantee shall cease to do an illegal act, is not on that account illegal;

(*z*) Vauxhall Bridge Co. *v.* Spencer, Jac. 64; see Lord Petre *v.* Eastern Counties Rail. Co., 1 Ry. Cas. 462.

(*a*) Chowne *v.* Baylis, 31 Beav. 351; see Dudley Banking Co. *v.* Spittle, 1 J. & H. 14.

but as there is no valuable consideration, the transaction is merely voluntary (*b*).

384. A person, who is sued at law upon a security which he alleges was given for an immoral consideration, is entitled to discovery in equity in aid of his defence; but there is no such right where discovery is sought from a participator in the immoral contract, who by giving the discovery would be exposed to penalties (*c*).

Of Securities which are affected by the Nature of the Security.— Of Securities upon the Profits of Offices.

385. The sale of public offices is *malum in se*, independently of the statute law (*d*). But by a statute of Edward 6, all assurances of any office concerning the administration or execution of justice, or any service of trust, or the receipt, control or payment of the king's revenues or customs, or the custody of fortresses, or the clerkship in any court of record where justice is to be administered, were declared to be void as against the person making the assurance, with an exception in favour of offices of inheritance and of the keeping of parks or forests (*e*). This act (preserving the exceptions) was afterwards extended (*f*) to Scotland and Ireland, and to all offices in the gift of the Crown, civil, naval and military commissions and employments under the control of the different officers of state (**372**).

Another statute (*g*) declares to be void all assignments of any pay, pension, allowance or relief, payable to any officer or person who has served in the king's forces, or any widow of any such officer, or any person receiving any allowance or pension on the compassionate list, or any pension, allowance or relief in respect of any military service.

386. Bills of sale, contracts and assignments of any pay, wages or allowances of money of any kind, due or to grow due to any seaman in the service of the Crown, are also void (*h*).

(*b*) Eddison *v.* Rothery, 10 Jur., N. S. 943.

(*c*) Benyon *v.* Nettlefold, 3 M. & G. 94; Franco *v.* Bolton, 3 Ves. 368.

(*d*) Stackpole *v.* Earle, 2 Wils. 133.

(*e*) 5 & 6 Edw. 6, c. 16.

(*f*) 49 Geo. 3, c. 126.

(*g*) 47 Geo. 3, c. 25, s. 4.

(*h*) 1 Geo. 2, stat. 2, c. 14, s. 7.

387. The accruing half-pay of military or naval officers in the service of the Crown (**759**) cannot, for reasons of public policy, be assigned by law (*i*). And it is provided by statute that all assignments of or securities upon the half-pay, pensions or allowances of officers, or other persons engaged in the military service of the Crown, are void (*k*). But where the assignment is not expressly forbidden by statute, and the grant of the pension does not imply the performance of any future duty to the state, with the performance of which the assignment might interfere, the assignment will be good. A pension for past services, granted by the East India Company to a military servant before the transfer of the military forces of the Company to the Crown, has therefore been held to be a good subject of a mortgage (*l*); and since the Transfer Act (*m*), an assignment of a pension granted to an officer of the same service has been supported, on the ground that not having been granted by the Crown, or taken from monies under the control of parliament, the assignment was not within the mischief of the statutes. But the observations of Lord Westbury, C. on the hearing of the appeal, and the compromise of the case by his desire, make it doubtful whether the decision would have been supported (*n*).

388. A revocable pension, granted as compensation for the loss of a civil office, may be assigned (*o*). It has been held otherwise as to a pension granted for the support of a dignity, and as a reward for great services: although in the case which raised the question the receipts of the grantee and his successors had been expressly declared to be the proper discharges for the pension (*p*).

(*i*) Flarty *v.* Odlam, 3 T. R. 681.

(*k*) 46 Geo. 3, c. 69, s. 7; and 47 Geo. 3, sess. 2, c. 25, s. 4; Lloyd *v.* Cheetham, 3 Gif. 171; 7 Jur., N. S. 1272.

(*l*) Heald *v.* Hay, 3 Gif. 467; 8 Jur., N. S. 379.

(*m*) 21 & 22 Vict. c. 106 (1858).

(*n*) Carew *v.* Cooper, 4 Gif. 619; 10 Jur., N. S. 11, 429. A retiring military pension granted by the Company has been held not to pass to the assignees on the bankruptcy of the pensioner, on the ground that not being granted under the common seal of the Company they could not be made liable in a court of law for payment of it. (Gibson *v.* East India Co., 5 Bing. N. C. 262.)

(*o*) Tunstall *v.* Boothby, 10 Sim. 542; Spencer *v.* Cox, 2 Anst. 535, n.

(*p*) Davis *v.* Duke of Marlborough, 1 Sw. 74.

389. There can be no assignment of the right to payments made to enable the recipient to perform future duties. The half-pay of officers and others in the public service falls within this rule, as the alienation of their stipends would prevent their prompt attention when called upon to fulfil the duties to which they are liable (*q*). Neither can an officer in the army mortgage or pledge his commission, or give a depository any right with respect to it. The utmost that he can do is to make an equitable assignment of the purchase-money in the hands of his agent after the sale of the commission (*r*).

390. The assignment by a judge of one of the supreme courts in India of the money directed to be paid to his representative by the statute 6 Geo. 4, c. 85, if he should die in and after six months' possession of office, is valid; and not being payable during the life of the judge is not an assignment of the salary within the statutes of Edw. 6 and 49 Geo. 3 (*s*).

391. The Court of Bankruptcy (*t*) may order such portion of the pay, half-pay, salary, emolument or pension of any bankrupt as on communication from the court the secretary of state for war or India, the Admiralty, the commissioners of customs or excise or other chief officer of the department to which the bankrupt belongs, may officially sanction to be paid to the assignees towards payment of his debts, the order or sanction being lodged in the office appointed to pay the pension or emolument.

392. The validity of securities upon the profits arising from the fellowships of colleges (**758**) has been the subject of conflicting decisions upon applications to enforce them by the appointment of a receiver. Upon one occasion (*u*) a motion for a receiver was dismissed with costs, but it was afterwards

(*q*) 2 Beav. 549; Stone *v.* Lidderdale, 2 Anst. 533; M'Carthy *v.* Goold, 1 Ba. & Be. 389.

(*r*) Collyer *v.* Fallon, T. & R. 459; L'Estrange *v.* L'Estrange, 13 Beav. 281; see Webster *v.* Webster, 31 Beav. 393; Buller *v.* Plunkett, 1 J. & H. 441; Somerset *v.* Cox, 33 Beav. 634; 10 Jur., N. S. 351.

(*s*) Arbuthnot *v.* Norton, 5 Moo. P. C. 219. As to the profits of the office of clerk of the peace, see Palmer *v.* Vaughan, 3 Sw. 173.

(*t*) 24 & 25 Vict. c. 134, s. 134.

(*u*) Berkeley *v.* King's College, 10 Beav. 602.

held (*x*) that there might be a receiver, both of past and future appropriations, in respect of the profits of a fellowship of the same college, the duties being so slight that no question of public policy could interfere with the validity of the assignment. And so it has been held (*y*) as to the canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence and of attendance on divine service; the performance of which duty by the canon is of no benefit to the public. But a mortgage of a canonry with the lands belonging to it cannot be enforced by ejectment, the canonry being only the name of an ecclesiastical office, and the owner of it having no property in the lands (*z*).

Of Securities upon Ecclesiastical Benefices.

393. Charges upon ecclesiastical benefices (**760, 881**) are forbidden by the statute 13 Eliz. c. 20, repealed by 43 Geo. 3, c. 84, and revived on the repeal of the latter statute by 57 Geo. 3, c. 99. The effect of the latter act was not retrospective (*a*), and an assignment after it was passed, of a term created to secure a charge upon a benefice, while such a charge was good was supported as being merely a continuation of the old charge (*b*).

394. The Bankrupt Act, 1861, provides (*c*) that if a bankrupt be a beneficed clergyman, the assignees may apply for and obtain a sequestration of the profits of his benefice, which are to form part of the bankrupt's estate, and be applied accordingly; and a certificate of the appointment of assignees shall be a sufficient authority for granting the sequestration without any writ or other proceeding to authorize the same; and such sequestration shall be issued as it might have been upon any writ of levari facias founded upon any judgment against the bankrupt. The sequestrator is to allow, out of the benefice, to the bankrupt while he performs the duties of

(*x*) Feistel *v.* King's College, 10 Beav. 491.

(*y*) Grenfell *v.* Dean and Canons of Windsor, 2 Beav. 544.

(*z*) Doe *d.* Butcher *v.* Musgrave, 1 Man. & G. 625.

(*a*) Doe *d.* Cates *v.* Somerville, 6 B. & C. 126; Metcalfe *v.* Abp. of York, 6 Sim. 224; 1 Myl. & Cr. 547.

(*b*) Doe *d.* Broughton *v.* Gully, 9 B. & C. 344; Doe *d.* Wilks *v.* Ramsden, 4 B. & Ad. 608.

(*c*) 24 & 25 Vict. c. 134, s. 135.

the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese shall direct. And the bishop is empowered to appoint to the bankrupt such or the like stipend as by law he might have appointed to a curate duly licensed to serve the benefice if the bankrupt had been non-resident.

The profits of the benefice do not under this provision become vested in the assignees of a bankrupt clergyman until sequestration obtained by them; and their right, therefore, does not override the prior sequestration of an ordinary creditor (*d*), although his sequestration was not published until after the act of bankruptcy was committed.

395. By the statute 17 Geo. 3, c. 53, commonly called "Gilbert's Act," incumbents of ecclesiastical benefices, upon which there is no house of habitation, or the house on which is so ruinous or mean that one year's income of the benefice is not sufficient to rebuild or repair it, are empowered, under the regulations of the act, to borrow at interest the estimated amount of the necessary outlay not exceeding two years' net income of the living after deducting outgoings, on mortgage of the glebe, tithes, rents and other profits of the benefice for twenty-five years, or till payment of the loan (*e*).

The interest on the principal of the mortgage debt, together with five per cent. of the principal originally advanced, or ten per cent. thereof where the incumbent does not reside upon the benefice for twenty weeks in the year, are made payable yearly (*f*).

Colleges and halls of the Universities of Oxford and Cambridge, or other corporate bodies, may lend money for the purposes of the act without interest, where the benefice for which the loan is raised is under their patronage (*g*). Loans may also be made under the act by the governors of Queen Anne's Bounty (*h*). And the patron of the living who may be a minor, idiot, lunatic or feme covert may be bound by the acts of his or her guardian, committee or husband (*i*)

(*d*) Hopkins *v.* Clarke, 4 B. & S. 836; 5 id. 753; 10 Jur., N. S. 1071.
(*e*) Sect. 1.
(*f*) Sect. 6, amended by 21 Geo. 3, c. 66, s. 1.
(*g*) Sect. 13.
(*h*) Sect. 12.
(*i*) Sect. 14.

396. The act enables incumbents to borrow money for the purpose of adding to (*k*), as well as of repairing or building a parsonage; and the mortgage is good though the money be advanced by the incumbent himself at a moderate rate of interest (*l*). But it may not be advanced by a person whose duty it is to see that the provisions of the act are properly carried out for the benefit of the living (*m*).

397. The Irish statute 10 & 11 Car. 1, c. 3, avoided all grants, charges and incumbrances (other than certain leases) which should be made by dignitaries of the church, and beneficed clergymen. By this it was intended to benefit the successor and not to fetter the incumbent, and benefices may be charged (*n*) in Ireland by demise, which will bind the grantor during incumbency and residence (according to the act) of the parson.

Of Securities upon Property forbidden to be incumbered.

398. A security may also be ineffectual by reason of some limitation or contract, under which the estate or interest of the maker, in the subject of it, is made to cease upon his creating or attempting to create an incumbrance thereon.

Where the prohibition extends to an attempt to incumber, a forfeiture is only created by an act which, but for the prohibition, would have the effect of an assignment or security upon the property. An offer to give a security will not create a forfeiture, much less the expression of a desire to create an incumbrance, and the taking advice as to the power to do so (*o*).

(*k*) Boyd *v.* Barker, 4 Dr. 582; 5 Jur., N. S. 234.

(*l*) Id. 5 Jur., N. S., supra.

(*m*) Greenlaw *v.* King, 3 Beav. 49; 4 Jur. 622; 5 id. 18.

(*n*) Wise *v.* Beresford, 3 Dr. & War. 276; see also 43 Geo. 3, c. 106, in Ireland, authorizing commissioners of first fruits to advance monies for the building, &c., of glebe houses to be a charge upon the ecclesiastical emoluments of the benefice, and to be paid by certain annual instalments; and see 10 Will. 3, c. 6 (Ireland); and see Brooke *v.* Horner, 10 Ir. Eq. R. 305; 11 id. 214; 13 id. 272. And as to the application of tithe-rent charges by the receiver towards the support of the church, Wise *v.* Beresford, supra; Cullen *v.* Dean of Killaloe, 2 Ir. Ch. R. 133.

(*o*) Graham *v.* Lee, 23 Beav. 388; 3 Jur., N. S. 551; Jones *v.* Wyse, 2 Keen, 285.

399. Where the terms of the prohibition are contained in a covenant by a lessee, a covenant not to transfer, assign, or otherwise part with the demised property or the lease, is not broken (*p*), by a deposit of the lease by way of equitable mortgage; the effect of such a covenant being only to restrain the alienation of the legal interest, to the prejudice of the lessor; and the depositee may obtain the usual order for sale in bankruptcy. So the contracting and non-payment of debts, and the giving as collateral security a warrant of attorney or cognovit under which judgment is entered up, and execution issued, is no breach of the covenant not to incumber (*q*), for the reason already noticed (**142**), that such a security, when given bonâ fide and not for the purpose of evading a restriction upon alienation, does not differ in character from an adverse judgment; and also where the covenant does not extend to the doing of any act whereby the property may be incumbered, because the giving such security does not amount to a direct charge or incumbrance. But an equitable mortgage by deposit, coupled with a warrant of attorney under which judgment was entered up, and execution issued, has been held (*r*) to determine the interest of a devisee under a conditional limitation, by which the estate was to go over if the devisee should dispose of or sell the property; because these being voluntary acts, which give the creditor a specific lien, and a right to sale in equity, and show a purpose to part with the possession, the judgment and execution had not the adverse character which is usually imputed to voluntary judgments. And a charging order under 1 & 2 Vict. c. 110, s. 14, will determine a life-interest, which is made determinable on the execution of an act by which it should be incumbered at law or in equity (*s*).

(*p*) Doe *d.* Pitt *v.* Hogg, 1 Car. & P. 160; 4 Dow. & Ry. 226; Ex parte Drake, 1 M., D. & De G. 539; and see Doe *d.* Goodbelieve *v.* Bevan, 3 M. & S. 353.

(*q*) Croft *v.* Lumley, 5 El. & Bl. 648, 682; 4 Jur., N. S. 903; 6 H. L. C. 672.

(*r*) Doe *d.* Norfolk *v.* Hawke, 2 East, 480.

(*s*) Montefiore *v.* Behrens, L. R., 1 Eq. 171.

A prohibition against incumbering the income of property will not invalidate a charge upon such income as has already become due at the date of the security (*t*).

Chapter III. Part 2.—Of Securities made under Statutory or other Powers.

400. *Of Powers to mortgage.*
409. *Of Securities by Married Women.*
421. *Of Securities upon the Property of Lunatics.*
426. *Of Securities by the Assignees of Bankrupts.*
427. *Of Securities by Trustees and Executors.*
439. *Of Securities by Agents—*
440. *Factors.*
454. *Bankers and Bill Brokers.*
456. *Partners.*

Of Powers to mortgage.

400. A power by which it is intended to authorize the raising of money on mortgage should expressly specify the intention. A mortgage may be made where the terms of a general power are sufficiently extensive, as for instance by the agent of a ship-owner, of the passage-money of passengers, under a power to mortgage the vessel, and generally to do all acts about the business and affairs, which the owner could have done (*u*); and by the directors of a company, empowered to do all such things as could be done by the company without a general meeting; but a general power to sell, assign and transfer is not sufficient for the purpose (*x*). The donor of a power of doubtful sufficiency may, however, by directions as to its exercise, preclude himself from disputing the validity of a security made under the power (*y*).

401. An instrument which authorizes the creditor of the principal to take possession and receive the profits of the

(*t*) Ex parte Stulz, 4 De G., M. & G. 404.

(*u*) Willis *v.* Palmer, 6 Jur., N. S. 732; 7 C. B., N. S. 340.

(*x*) Australian, &c. Co. *v.* Mounsey, 4 K. & J. 733; De Bouchont *v.* Goldsmid, 5 Ves. 210.

(*y*) Perry *v.* Holl, 2 Gif. 138; 6 Jur., N. S. 661; 2 De G., F. & J. 38.

estate till payment operates not only as a power of attorney, but as an actual charge; and a power so operating is not revoked or revocable by the death or act of the debtor, though it be not expressly declared to be irrevocable (*z*).

402. The power must be exercised in accordance with the general terms of the instrument in which it is contained; so that a corporation having a general power by statute to mortgage their lands, cannot mortgage those which by the same act they are bound to sell within a limited time. Nor, where a mortgage is made under a provision that all mortgagees shall be on an equal footing, can an undue advantage be given to the creditor by a security upon other property belonging to the donees of the power (*a*).

The mortgage, however, is not invalid only because it is made to secure a debt originally contracted on an improper security; so it be clear that the mortgage is to secure the money, and not to support the invalid transaction (*b*).

403. A power to mortgage in a certain manner is not inconsistent with the existence of a general right to mortgage property vested in the donees of the power, if they hold it in a capacity, and mortgage it for purposes which do not affect the exercise or the objects of the power. Hence a mortgage by trustees of a public company of the plant, tools and machinery used in the construction of their works, is not ultra vires, although they were empowered by statute to mortgage in their corporate capacity the rates and tolls granted by the act (*c*). And a court of equity will give effect to an intention to create a security where the maker is of capacity to contract the debt, notwithstanding any mistake in the manner of doing it; upon the principle that in equity whatever is agreed to be done is considered as done (*d*).

404. But if the maker of the security be not of capacity

(*z*) Spooner *v.* Sandilands, 1 Y. & C. C. C. 390; Walsh *v.* Whitcombe, 2 Esp. 565; Abbott *v.* Stratten, 3 J. & L. 603, 612; Gaussen *v.* Morton, 10 B. & C. 731.

(*a*) De Winton *v.* Mayor of Brecon, 26 Beav. 533.

(*b*) Scott *v.* Colburn, 26 Beav. 276; 5 Jur., N. S. 183.

(*c*) M'Cormick *v.* Parry, 21 L. J., Exch. 143; 7 Exch. 355.

(*d*) In re Strand Music Hall Co., 13 L. J., N. S., Ch. 177.

to contract the debt; as if borrowing be expressly forbidden, or be authorized only subject to the performance of certain conditions, which have not been performed, no debt will arise at law. So that where a company under such circumstances issued Lloyd's bonds (*e*), by mortgage of which money was raised to discharge a debt incurred for the use of the company, it was not only declared that the bonds were void as having been issued ultra vires, but that no debt was created against the company; because a corporation created for particular purposes is not bound at law by a deed under the corporate seal, where, by the express provision of or necessary implication from the statute which creates the corporation, the deed is ultra vires (*f*).

But, in equity, money borrowed on behalf of and shown to have been bonâ fide applied for the use of a company may be recovered, though the directors, without being expressly forbidden, were not expressly empowered to borrow (*g*). And so if a trustee improperly raise money by mortgage, although the security will be void against a mortgagee with notice, he may be a creditor (*h*) on the proceeds of the estate to the extent to which the money lent was properly applied in administration.

(*e*) Chambers *v.* Manchester and Milford Rail. Co., 5 B. & S. 588; 10 Jur., N. S. 700. A *Lloyd's bond* is an instrument under seal, amounting to an account stated and containing a promise to pay. In form the makers acknowledge themselves to be indebted to one in a certain sum for money due from them to him, and covenant for themselves, their heirs or successors and assigns, with the creditor, his executors and administrators, to pay to him, his executors, administrators and assigns, the money acknowledged to be due on a certain day, with interest, until payment as therein mentioned. It was thus intended to enable a company to give to contractors to whom the company were indebted for works something upon which money might be realized, and for this purpose the security is said to be unobjectionable. But it cannot be used for raising money to discharge liabilities which the company could not legally contract. It cannot be valid as a security for a debt which does not exist, and cannot create a debt where there is none.

(*f*) Per Parke, B., South Yorkshire, &c. Co. *v.* Great Northern Rail. Co., 9 Exch. 55. And as to the extent to which corporations may be bound by acts ultra vires, see Mayor of Norwich *v.* Norfolk Rail. Co. 4 E. & B. 397, 413; Bateman *v.* Mayor of Ashton, 3 H. & N. 323.

(*g*) Troup's case, 29 Beav. 353; Hoare's case, 30 Beav. 225.

(*h*) Devaynes *v.* Robinson, 24 Beav. 86; 3 Jur., N. S. 1143.

405. The power, whether special or general, must also be exercised only for purposes consistent with the objects of the trust or undertaking, for the furtherance of which it is given. Therefore, the committee of a benefit building society cannot raise money on mortgage for the purchase of land, because the purchase of land is not a legitimate object of such a society. And the trustees of a chapel, empowered to raise a sum sufficient for the payment of all debts, have been restrained from mortgaging without necessity, and for a sum insufficient for that purpose. So a power in a marriage settlement, for the parents, with the consent of the trustees, to revoke the old and to declare new uses, cannot be exercised for the purpose of mortgaging the estate for the benefit of the father, and to the prejudice of the children entitled under the trusts (*i*).

406. This principle has also been applied in the construction of securities issued by railway and other public companies (**757**) under the name of debentures, in which it is usual to assign, in terms more or less extensive, not only the tolls and rates arising from the undertaking, but also "the undertaking" itself; the word "undertaking," which was adopted (probably for the sake of conciseness) in the various statutes relating to public companies, and in the form of mortgage or debenture given in the Companies Clauses Act, 1845, being by the interpretation clause of the latter act only explained to mean "the undertaking or works of whatever nature which should by the special act be authorized to be executed;" and, by the like clause of the Railways Clauses Consolidation Act, signifying "the railway and works" authorized to be executed.

So far, however, as the operation of a debenture made under the former act depends upon the use of this word, it has been determined (*k*) that it imports, not the surplus or other

(*i*) In re Kent Benefit Building Society, 7 Jur., N. S. 1045; Rigall *v.* Foster, 18 Jur. 39; Eland *v.* Baker, 29 Beav. 137.

(*k*) Gardner *v.* London, Chatham and Dover Rail. Co., L. R., 2 Ch. App. 201. It should be observed that by the security in question the undertaking and tolls were assigned (as is usual in such cases) to the debenture holder, "his *executors, administrators and assigns;*" see Doe *d.* Myatt *v.* St.

lands, capital, rolling or other stock, or any other of the separate ingredients of which the whole undertaking is composed, nor even the whole undertaking as a thing, with the vitality of which the debenture holder, by exercising the ordinary remedies of a mortgagee, may interfere; but as concerns his power over it, the complete undertaking only, as a going concern or fruit-bearing tree, the produce of which and not the thing itself constitutes the security. The principal ground of this construction is, that a mortgage which would enable the creditor at his pleasure to enforce the ordinary remedies of a mortgagee against the whole or any particular part of the undertaking of the company, the debentures of which are in question, would be inconsistent with the primary object for the attainment of which the powers of the company (including the power of mortgaging) were granted,—as, in the case of a railway company, the object of making and maintaining a great public communication (*l*).

407. Before the force of the word "undertaking" had been thus declared, it had been held at law, that a mortgage of the undertaking, rates and tolls does not pass the land or the stock or property of a railway company as carriers (*m*); although in equity a debenture mortgage of the undertaking, and all tolls and monies arising by virtue of the act, was held to give the holder priority upon the proceeds arising from the sale of a railway over subsequent judgment creditors (*n*).

408. The word "estate" in a mortgage of the lands, tenements and estate of a company and of all their undertaking, means estate ejusdem generis with lands and tenements, and does not comprise as part of the estate or undertaking unpaid

Helen's Rail. Co., 2 Q. B. 365; Wickham *v.* New Brunswick, &c. Rail. Co., L. R., 1 P. C. 64, where, however, there was an express proviso that the debentures should not be a charge upon the company's lands; and Legg *v.* Mathieson, 2 Gif. 71; 6 Jur., N. S. 1010; 29 L. J., Ch. 385, where under the Railways Clauses Act the word undertaking was held to pass an interest in the land.

(*l*) As to the liability of a company and its creditors to use the property for the purposes of the undertaking, see further, Russell *v.* East Anglian Rail. Co., 3 Mac. & G. 104, 125; Potts *v.* Warwick, &c. Canal Co., Kay, 142.

(*m*) Hart *v.* Eastern Union Rail. Co., 7 Exch. 246; 8 id. 116.

(*n*) Furness *v.* Caterham Rail. Co., 27 Beav. 358.

calls, which are mere debts, or capital not called up (*o*). It has even been determined that directors of a society, authorized to borrow on the security of the funds and property of the society, cannot mortgage the subscribed capital not paid up, and which is to be raised by calls to be made at the discretion of the directors (*p*); there being no means of enforcing such a mortgage but by a receiver, to whom the discretion of the directors cannot be delegated. But the reason seems to be inconsistent with the fact that mortgages of future calls are expressly contemplated in the statutory form of mortgage provided in the Companies Clauses Consolidation Act (*q*).

A mortgage of a proportion of the toll-houses and gates of a public road passes an interest in the land upon which the mortgagee may bring ejectment, notwithstanding a proviso that the mortgagees shall be creditors on the tolls in equal degree (*r*); but a mortgage of the tolls, rates and duties only, gives no right to the land (*s*). Nor is a power to mortgage the toll-houses or gates included in a power to mortgage the undertaking and tolls (*t*).

Of Securities by Married Women.

409. By virtue of the Fines and Recoveries Act (*u*), a married woman, with the consent of her husband, may mortgage her interest whether in possession or reversion, not only in lands (except in certain cases copyholds) and money subject to be invested in the purchase of lands, but also in the proceeds of land directed to be sold, to the exclusion of her equity to a settlement for her maintenance (*x*). The husband

(*o*) King *v.* Marshall, 33 Beav. 565; 10 Jur., N. S. 921.

(*p*) In re British Provident, &c. Society, 10 Jur., N. S. 713; 33 L. J., Ch. 535.

(*q*) Sched. C.; and see Wickham *v.* New Brunswick, &c. Rail. Co., L. R., 1 P. C. 64.

(*r*) Doe *d.* Banks *v.* Booth, 2 Bos. & P. 219.

(*s*) Perkins *v.* Deptford Pier Co., 13 Sim. 277.

(*t*) Fairtitle *v.* Gilbert, 2 T. R. 169; Doe *d.* Myatt *v.* St. Helen's Rail. Co., 2 Q. B. 365.

(*u*) 3 & 4 Will. 4, c. 74, s. 77.

(*x*) Briggs *v.* Chamberlain, 11 Hare, 69; 18 Jur. 56; on the authority of May *v.* Roper, 4 Sim. 360, before the act, and notwithstanding Hoby *v.* Allen, 15 Jur. 835; see Williams *v.* Cooke, 9 Jur., N. S. 658.

and wife, or the husband alone, may also (*y*) during the coverture dispose by sale or mortgage of the wife's term of years, whether legal or equitable, or whatever be the nature of her interest therein. The assignment of her legal interest in the term will, like a complete assurance of her real estate, be absolutely binding upon her; and even a voluntary assignment (apart from any question arising from actual fraud) so completely divests her right, that a subsequent mortgage after the death of her husband will not operate as a revocation under the statute 27 Eliz. c. 4 (*z*).

410. As to the choses in action of a married woman, a modern statute provides (*a*) that it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of her, or her husband in her right, in any personal estate to which she shall be entitled under any instrument made after 31st December, 1857 (except a settlement or agreement for a settlement made on her marriage), and to release or extinguish any power vested in her in regard to any such personal estate, as effectually as she could do if she were a feme sole; and also to extinguish her equity to a settlement out of any personal estate to which she or her husband in her right may be entitled in possession under any such instrument, the deed being made with the concurrence of the husband, and being acknowledged by the married woman in the manner required by the Fines and Recoveries Act (*b*). The act does not extend to reversionary interests which the married woman is restrained from alienating or affecting, nor to powers which are vested in her independently of the act.

411. Except under the operation of this act no disposition of the wife's reversionary choses in action, without or with her concurrence, will affect her title by survivorship after the death of her husband without having reduced the property

(*y*) Bates *v.* Dandy, 2 Atk. 207; 3 Russ. 72 n.; Donne *v.* Hart, 2 R. & M. 360; Sir E. Turner's case, 1 Vern. 7; 1 Ch. Ca. 307.

(*z*) Hill *v.* Edmonds, 5 De G. & S. 603; Hatchell *v.* Egglex, 1 Ir. Ch. R. 215; Doe *d.* Richards *v.* Lewis, 15 Jur. 512; 11 C. B. 1035.

(*a*) 20 & 21 Vict. c. 57 (1857, Malins' Act).

(*b*) 3 & 4 Will. 4, c. 74. In Ireland 4 & 5 Will. 4, c. 92.

into possession (*c*), or her statutory title as a feme sole where after the mortgage she has obtained a decree of judicial separation and is living apart from her husband (*d*), either as against the particular assignee of the fund or the assignee in bankruptcy of the husband: the result being the same, whether the husband had or had not the opportunity of reducing the fund into possession in his lifetime (*e*). And if the title of the wife surviving be for any reason doubtful, it will still prevail if by a decree in a suit affecting the property the fund have been ordered to be paid to her (*f*), or she have acquired a legal title (*g*), as by being executor of the person under whose will she is entitled to the fund.

412. Where the chose in action consists of a mortgage debt, the deposit by the husband of the deeds of the estate by way of equitable mortgage will not be a reduction of the mortgage debt into possession: the possession of the deeds, either by the husband or the depositee, not being equivalent to but only giving a right to obtain possession of the money (*h*).

413. But the equitable interest for life of the wife in real or personal estate is subject to her equity to a settlement as against the assignee in bankruptcy of her husband (*i*); because the assignee stands in the place of the husband and takes subject to his liability to maintain his wife. This rule has also been applied against the mortgagee of the wife's equitable absolute interest in a term of years (*k*), although the application of the doctrine under any circumstances to equitable interests in land appears to be inconsistent with the

(*c*) Purdew *v.* Jackson, 1 Russ. 1; Hornsby *v.* Lee, 2 Mad. 16; Honner *v.* Morton, 3 Russ. 65; Wilkinson *v.* Charlesworth, 10 Beav. 324.

(*d*) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; In re Insole, L. R., 1 Eq. 470.

(*e*) Ellison *v.* Elwin, 13 Sim. 309; Ashby *v.* Ashby, 1 Col. 553.

(*f*) Hutchings *v.* Smith, 9 Sim. 138.

(*g*) Michelmore *v.* Mudge, 2 Gif. 183.

(*h*) Michelmore *v.* Mudge, supra. If the assignment be made under the law of a foreign country, it will be treated, in the absence of evidence as to the husband's rights under that law, only as an assignment of the husband's chance of survivorship, and a stop order will be granted only during the husband's life. (Moreau *v.* Polley, 1 De G. & S. 143.)

(*i*) Sturgis *v.* Champneys, 5 M. & C. 97; Barnes *v.* Robinson, 9 Jur., N. S. 245.

(*k*) Hanson *v.* Keating, 4 Hare, 1.

rule formerly observed, viz., that such interests were not subject to the same equity as personalty, because of their analogy to legal estates (*l*). The wife's equity, however, has been held not to be enforceable against the mortgagee of the husband's interest in the wife's land, where she is seised of the inheritance (*m*), nor against the assignee for value of her equitable life interest in real or personal estate, whether it be immediate or reversionary, where at the time of the assignment the husband was willing and able to maintain her, and her equity cannot be revived by the husband's subsequent refusal or neglect to do so (*n*).

414. The wife may enforce her right to a settlement as well in a suit by herself as by the person claiming under the assignment or insolvency; and she is not deprived of it because she has the legal reversion, if an outstanding legal interest leaves her with a present right which is enforceable only in equity (*o*).

415. It has been held (*p*) that a mortgage without fine by husband and wife of her real estate for a term was established after the death of the husband by her acts, amounting to a re-delivery of the deed, and therefore to a new grant; she having given up possession and directed the tenants to attorn

(*l*) See 4 Hare, 8; Sir E. Turner's case, supra. It does not appear that Lord Hardwicke disapproved of this case, as Lord Cottenham seems to have inferred (5 M. & C. 107) from the report in 2 Atk. 421. In the report of Bates *v.* Dandy, 3 Russ. 72, n., Lord Hardwicke speaks of Turner's case as accepted law and the foundation of many authorities.

(*m*) Durham *v.* Crackles, 8 Jur., N. S. 1174; see Newenham *v.* Pemberton, 17 L. J., N. S., Ch. 99. In Duncombe *v.* Greenacre, 28 Beav. 472; 29 id. 578; 7 Jur., N. S. 175, the wife was entitled to money charged on land, and secured by powers of entry, sale and mortgage; and which was assigned by the husband for valuable consideration. In a suit by the wife to have the charge raised, and for a settlement, an objection of the assignees to the payment of the fund into court by the owner of the estate, on the ground that the wife would then become entitled to a settlement, was overruled; and the fund having been paid in, the whole of it was afterwards settled.

(*n*) Elliott *v.* Cordell, 5 Mad. 149; Stanton *v.* Hall, 2 R. & M. 175; Tidd *v.* Lister, 3 De G., M. & G. 857; Re Duffy's Trust, 28 Beav. 386; Life Association of Scotland *v.* Siddal, 3 De G., F. & J. 271.

(*o*) Barnes *v.* Robinson, 9 Jur., N. S. 245; Newenham *v.* Pemberton, 17 L. J., N. S., Ch. 99.

(*p*) Goodright *d.* Carter *v.* Straphan, Lloft, 763; Cowp. 201.

to the mortgagee and accounted to him as such. But the mere payment of interest by the widow has been held (*q*) not to set up such a mortgage, because the term ceased absolutely at the husband's death: though it was said that by acceptance of rent, if any had been reserved, the mortgage would have stood. These decisions can hardly be otherwise regarded than as contradictory. The principle of the latter is affirmed by a modern case in which a joint security, which was ineffectual by reason of the imperfect exercise of a power of appointment, was held not to bind the wife, though for many years after her husband's death she had paid interest upon it (*r*). The case of Goodright *v.* Straphan is supported by Mr. Coventry (*s*), on the ground that the lease was voidable only and not void; but this is contrary to the express judgment of Lord Mansfield and of the whole Court of King's Bench.

A mortgage by husband and wife without fine will bind her after a joint answer by her and her husband in a foreclosure suit, because the joint answer is equal to a fine (*t*).

416. A married woman being entitled in equity to hold property for her separate use, may also contract debts to be paid out of it, either by a direct mortgage or charge upon the separate estate, or by a bond, promissory note, bill of exchange or written promise to pay the debt or demand, though not referring to her separate estate; because by means of it only the obligation can be satisfied (*u*). The power of contracting a debt upon the credit of the separate estate is treated as incident to the ownership of the estate (*x*), and is not, as was formerly thought, exercised by way of equitable appointment under the settlement (*y*).

The written engagements of a married woman will also be

(*q*) Drybutter *v.* Bartholomew, 2 P. W. 127.

(*r*) Blandy *v.* Kimber, 24 Beav. 148.

(*s*) Pow. Mort., ed. 6, 721 *a*, n. (*q*).

(*t*) Anon. Mos. 248.

(*u*) Hulme *v.* Tenant, 1 Bro. C. C. 15; Heatley *v.* Thomas, 15 Ves. 596; Bullpin *v.* Clarke, 17 Ves. 365; Field *v.* Sowle, 4 Russ. 112; Stuart *v.* Lord Kirkwall, 3 Mad. 387; Murray *v.* Barlee, 3 M. & K. 209; Greenough *v.* Sherlock, 10 L. T., N. S. 316.

(*x*) Owen *v.* Dickenson, Cr. & Ph. 48.

(*y*) Field *v.* Sowle, 4 Russ. 112.

covered by her testamentary charge of her debts on her estate (*z*).

417. It has been intimated, but not expressly decided, that the separate estate of a married woman is liable to debts, contracted on her verbal or general engagement, provided it appear that the engagement was made with reference to and on the credit of the separate estate; a fact which is to be judged of by the court according to the circumstances of the case, and may be considered to be implied where the married woman is living apart from her husband (*a*). The mere transaction of business relating to the separate estate, for the husband and wife, does not make it liable to the costs (*b*).

418. Where a married woman has a general power of appointment by deed or writing, the corpus of the property, subject to her right of mortgage or alienation, is liable (*c*) to all such debts or engagements as are chargeable on her separate estate; because as to the property subject to the power, she is a feme sole.

Where the power can only be exercised by will, the exercise of it will not make the property liable to the debts of the married woman; for neither by the power itself nor by the exercise of it does the property become her separate estate (*d*). Yet if she have been guilty of fraud in the contract, as by holding herself out as a single woman, the liability will attach (*e*).

419. To create an effectual charge upon the separate estate of a married woman, the obligation must be made under such circumstances, that it can only be satisfied by resorting to her separate estate, or she must have shown a clear intention to bind her interest. Her mere concurrence with her husband in a security, without any contract on her part,

(*z*) Owen *v.* Dickenson, supra.

(*a*) Tullett *v.* Armstrong, 4 Beav. 319; Vaughan *v.* Vanderstegen, 2 Dr. 165; Johnson *v.* Gallagher, 7 Jur., N. S. 273; see Owen *v.* Dickenson, and Murray *v.* Barlee, supra.

(*b*) Callow *v.* Howle, 1 De G. & S. 531.

(*c*) Hulme *v.* Tenant, 1 Bro. C. C. 15; Field *v.* Sowle, 4 Russ. 112; Johnson *v.* Gallagher, 7 Jur., N. S. 273; see Smith *v.* Smith, 9 Beav. 80.

(*d*) Vaughan *v.* Vanderstegen, supra; Blachford *v.* Woolley, 9 Jur., N. S. 568; Hobday *v.* Peters, 28 Beav. 354; see Hughes *v.* Wells, 9 Hare, 749; and Johnson *v.* Gallagher, supra.

(*e*) Vaughan *v.* Vanderstegen, supra.

will not bind her separate estate if the terms of the deed are consistent with an intention that the husband's interest alone shall be bound (*f*); but if by mistake she should affect to appoint a larger interest than she has, the security will be good for her actual interest (*g*). And an assignment by her of property, to the income only of which she is entitled for her separate use, amounts to an assignment of her interest in the income (*h*).

420. A devise of real estate to a married woman in fee may, by virtue of a clause of separate use, be qualified by a restraint upon sale or incumbrance (*i*); though where separate estate is subjected to the appointment of the woman, with restraint on anticipation, and in default of appointment it is given for her separate use generally, the clause against anticipation applies only to the power, and not to the trust; and under the latter the estate may be assigned (*k*).

Of Securities upon the Property of Lunatics.

421. By the Lunatics' Regulation Consolidation and Amendment Act (*l*), where it appears to the Lord Chancellor (*m*) intrusted with the custody of lunatics to be just and reasonable, or for the lunatic's benefit, he may order that any estate or interest of the lunatic in land or stock, either in possession, reversion, remainder, contingency or expectancy, be sold or charged by way of mortgage, or otherwise disposed of as may seem to him most expedient, for the purpose of raising money to be applied, and may accordingly order that the money when raised may be applied, for or towards all or any of the purposes following, viz.:—

1. The payment of the lunatic's debts or engagements;
2. The discharge of any incumbrance on his estates;

(*f*) Tullett *v.* Armstrong, 4 Beav. 319.

(*g*) Wainwright *v.* Hardisty, 2 Beav. 363.

(*h*) Crosby *v.* Church, 3 Beav. 485.

(*i*) Baggett *v.* Meux, 1 Col. 138; 1 Ph. 627.

(*k*) Barrymore *v.* Ellis, 8 Sim. 1; Brown *v.* Bamford, 11 Sim. 127, and 1 Ph. 620; Vaughan *v.* Vanderstegen, 2 Dr. 188; Moore *v.* Moore, Ex parte Asprey, 8 Jur. 139.

(*l*) 16 & 17 Vict. c. 70, ss. 116—139. And see the interpretation clause.

(*m*) This includes the Lords Justices.

3. The payment of any debt or expenditure incurred or made after inquisition, or authorized by the Lord Chancellor so intrusted to be incurred or made for the lunatic's maintenance, or otherwise for his benefit;
4. The payment of, or provision for, the expenses of his future maintenance;
5. The payment of the costs of applying for, obtaining and executing the inquiry, and of opposing the same;
6. The payment of the costs of any proceeding under or consequent on the inquisition, or incurred under order of the Lord Chancellor so intrusted: and,
7. The payment of the costs of any such sale, mortgage, charge or other disposition, as is by the act authorized to be made.

And the committee of the estate, in the name and on behalf of the lunatic, shall execute and do all such conveyances, deeds, transfers and things relative to any such mortgage or charge, and for effectuating the provisions of the act, as the Lord Chancellor (in lunacy) shall order. And every mortgage or other disposition made by virtue of the act is as valid as if the person in whose name or place, or on whose behalf the same was made, had been of sound mind and had made the same.

On a disposition of the real estate of a married woman under this act, the Lord Chancellor cannot confer upon the committee a statutory power under which the legal estate will pass, so as to dispense with an acknowledgment under the Fines and Recoveries Act. But the conveyance by the committee under the order will bind the estate in the hands of the heir, so as to compel him to give effect to it by a valid conveyance (*n*).

422. Where a charge or mortgage is made under the act, upon an interest in contingency, reversion, remainder or expectancy, for the expenses of future maintenance, the Lord Chancellor (in lunacy) may direct the same to be paid either contingently, where the interest charged is contingent, or upon the happening of the event if the interest depend upon

(*n*) In re Stables, 10 Jur., N. S. 245.

an event which must happen, and either in a gross sum or in annual or other periodical sums, and at such times, in such manner, and with or without interest, as he shall deem expedient; and any charge made before, and which would have been valid if made after the passing of the act, is declared to be valid (*o*).

423. Where it appears to the Lord Chancellor (in lunacy) to be for the lunatic's benefit, he may order that the whole or part of the monies expended, or to be expended under his order, for the permanent improvement, security or advantage of the land of the lunatic, or of any particular part thereof, shall with interest be a charge upon and be raiseable out of the lunatic's estate and interest in the land, or such particular part thereof as aforesaid; but so that no right of sale or foreclosure during the lifetime of the lunatic be given or acquired under or by virtue of the charge, and the interest shall be kept down during the lunatic's life out of the income of his general estate, so far as the same shall be sufficient to bear it; and the committee of the estate shall in the name and on behalf of the lunatic execute all such conveyances for effectuating this provision as the Lord Chancellor (in lunacy) shall order: and such charge may be made either to some person advancing the money, or if the money is paid out of the lunatic's general property, to some person as a trustee for him, as part of his personal estate (*p*).

424. On any monies being raised by sale, mortgage, charge or other disposition of land, made in pursuance of any of the foregoing provisions, the person whose estate is sold, mortgaged, charged or otherwise disposed of, and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus monies remaining, after the purposes for which the monies shall have been raised shall have been answered, as he or they would have had in the estate if no sale, mortgage, charge or other disposition thereof had been made; and the surplus monies shall be of the same nature and character as the estate sold, mortgaged, charged or otherwise disposed of; and the Lord Chancellor

(*o*) Sect. 117. (*p*) Sect. 118.

(in lunacy) may make such orders, and direct such conveyances, deeds and things to be, and the same shall be, executed and done, as may be necessary for effectuating this provision and for the due application of the surplus monies (*q*).

425. The Lunacy Regulation Act, 1862 (*r*), also provides, that for giving effect to any order made under the act for rendering the property of a person of unsound mind, not found so by inquisition, available for his maintenance or benefit, or for carrying on his business, the Lord Chancellor (in lunacy) may order any land, stock or other property of such person as aforesaid, to be sold, charged by way of mortgage or otherwise disposed of, and a conveyance, transfer or other disposition thereof to be executed or made by any person on the lunatic's behalf; and may order the proceeds of any such sale, charge or other disposition, or the dividends or income of such land, stock or property, to be paid to any relative of such insane person, or to such other person as it may be considered proper to trust with the application thereof, to be applied by him to the maintenance or for the benefit of the insane person, or of him and his family, either at the discretion of such relative or person, or in such manner and subject to such control and with or without such security for the application thereof, as the Lord Chancellor (in lunacy) may direct; and who for the purpose above mentioned shall have all the same powers with respect to the transfer, sale and disposition of and otherwise respecting the real and personal property of such person, as if he had been found lunatic by inquisition.

And for extending the powers over the property of lunatics given by the act of 16 & 17 Vict. c. 70, s. 116 (**421**), where it appears to the Lord Chancellor (in lunacy) to be for the lunatic's benefit, he may order any estate or interest of the lunatic in land or stock, either in possession, reversion, remainder, contingency or expectancy, and either existing or which may exist at any future time, to stand charged with any monies advanced or to be advanced, or due or to become due to any person for or in respect of any of the purposes or

(*q*) Sect. 119.

(*r*) 25 & 26 Vict. c. 86, s. 13.

matters mentioned in the said section, and either with or without interest on such monies; and he may also order any such estate and interest to be dealt with and disposed of as he shall consider expedient for any of the purposes aforesaid, or for securing any monies advanced or to be advanced for such purposes or any of them, and with or without interest for the same; and every charge and disposition made by or in pursuance of any such order, shall take effect subject only to any prior charge to which the estate or interest affected thereby may at the date of such order be subject (*s*).

Of Securities by the Assignees of Bankrupts.

426. By order of the Court of Bankruptcy, the assignees of a bankrupt may execute, with or without powers of sale and other powers, a mortgage or pledge of any of the bankrupt's property, where a resolution has been passed by a meeting of the creditors summoned by the assignees (by notice stating the object of the meeting, and at which three-fourths in value of the creditors shall be present or represented), that the debts of the bankrupt can be discharged by means of money raised by such mortgage or pledge (*t*).

Of Securities by Trustees and Executors.

427. A modern act of parliament provides (*u*), that where by any will which shall come into operation after the 13th day of August, 1859, the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust (*x*), and for every person in whom the devised estate shall be vested by survivorship, descent or devise, or who may be appointed under any power in the will or by the Court of Chancery to succeed to the

(*s*) Sect. 16.
(*t*) 24 & 25 Vict. c. 134, s. 133.
(*u*) 22 & 23 Vict. c. 35, s. 14.
(*x*) Sect. 15.

trusteeship vested in such devisee or devisees in trust, and notwithstanding any trusts actually declared by the testator to raise such debts, legacy or money by a sale or mortgage of the said hereditaments or any part thereof, or partly in one mode and partly in the other, and in case of mortgage, reserving such rate of interest and fixing such period or periods of repayment as the person or persons executing the same shall think proper.

428. If any (*y*) testator, who shall have created such a charge as is described in sect. 14, shall not have devised the hereditaments charged so that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will, or in whom the executorship shall for the time being be vested, shall have the same or the like power of raising the said monies as is vested by the act in the devisee or devisees in trust. But any sale or mortgage under the act shall operate only on the estate and interest, whether legal or equitable, of the testator; and shall not render it unnecessary to get in any outstanding subsisting legal estate.

429. Purchasers (*z*) or mortgagees shall not be bound to inquire whether the powers conferred by any of the above provisions shall have been duly and correctly exercised by the person or persons acting in virtue thereof. Nor (*a*) shall the said provisions prejudice or affect any sale or mortgage made in pursuance of any will coming into operation before the passing of the act, but the validity of any such sale or mortgage shall be ascertained and determined as if the act had not passed. The powers do not apply to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, and do not affect the power of any such devisee or devisees to sell or mortgage as he or they might have done before the passing of the act.

430. Independently of this act, where real estate is charged with payments, the mode of raising which is not prescribed, they may be raised by way of mortgage or of sale in exercise

(*y*) Sect. 16. (*z*) Sect. 17. (*a*) Sect. 18.

of the implied power which arises by force of the charge, and which in equity enables the executor of the testator, as well it seems in the case of descent to convey, as in case of a devise to call for a conveyance of, the legal estate (*b*); although at law it has been held that the executor is not authorized to convey the legal estate (*c*), even where it has descended. If the estate be charged generally with the payment of debts, or of debts and legacies, the charge amounts to a declaration that the persons responsible for payment of the debts are intrusted with the receipt and application of the money, and the mortgagee is free from obligation although there were no debts, or they were discharged at the time of the mortgage (*d*): the presumption being that the money is raised for the payment of the debts; and this presumption is not displaced merely by the circumstance that the executor and devisee of the estates charged has included in the security, property which formed no part of the testator's estate (*e*).

431. The mortgagee is justified in taking the word of the executor or trustee as to the necessity for raising the money, where there are no circumstances which may create a reasonable doubt as to the motive or objects for raising it (*f*). But where money is proposed to be raised after a considerable lapse of time, and without apparent reason, the mortgagee is bound to make proper inquiry (*g*). A mortgage made by a trustee, under colour of a charge, seventeen years after the death of the testatrix, and under circumstances which showed

(*b*) Ball *v.* Harris, 4 M. & C. 264; Eland *v.* Eland, id. 420; Stroughill *v.* Anstey, 1 De G., M. & G. 635; Eidsforth *v.* Armstead, 2 K. & J. 333. As to the cases in which the implied power arises, id.; and Storey *v.* Walsh, 18 Beav. 559; Wrigley *v.* Sykes, 21 Beav. 337; Colyer *v.* Finch, 5 H. L. C. 922; Hodkinson *v.* Quinn, 1 J. & H. 303.

(*c*) Doe *d.* Jones *v.* Hughes, 6 Exch. 223.

(*d*) Per Lord St. Leonards in Stroughill *v.* Anstey, commenting upon Johnson *v.* Kennett, 6 Sim. 384; 3 M. & K. 624; Page *v.* Adam, 4 Beav. 269; Forbes *v.* Peacock, 11 Sim. 152; 1 Ph. 717; 11 M. & W. 639; Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272; 18 Jur. 321, 363; Bolton *v.* Stannard, 4 Jur., N. S. 576; see Cook *v.* Dawson, 29 Beav. 123; 3 De G., F. & J. 127.

(*e*) Barrow *v.* Griffith, 11 Jur., N. S. 6.

(*f*) Hartland *v.* Murrell, 27 Beav. 204.

(*g*) Stroughill *v.* Anstey, supra; see Colyer *v.* Finch, supra.

that the payment of her debts could not have been the whole object, was set aside as against the transferee. But a sale made twenty-seven years from the death, where there were no such circumstances, has been supported (*h*).

432. The simple contract debts of deceased debtors become by the effect of the statute (*i*), which makes the land assets for the payment of such debts, a general charge upon the land; and a purchaser from the heir or devisee, without notice that the sale is made for the purpose of defeating creditors, may assume that it is required for the due administration of the estate, and is not bound to see to the application of the purchase-money (*k*).

433. Where there is an express direction to raise the charge, if the trusts of the will require that a gross sum should be raised, it may be raised out of the estate itself, although the rents and profits be the only specified fund (*l*); and upon this principle fines for the renewal of leases for lives, and upon taking admittance to copyholds, may be so raised (*m*). Where there is a power to raise fines out of *annual* rents and profits, with power to mortgage, in case the necessary sums shall not be provided in that manner, the fines will be payable out of the income, if it be sufficient (*n*). But where the power is simply to raise the fines out of the rents, or by mortgage, if the trustees refuse to exercise their discretion as to the mode of raising the money, the court, in pursuance of its general principles, will so raise it as to throw the burthen upon the parties in proportion to their interests in the property charged,

(*h*) Burt *v.* Freeman, 6 Jur., N. S. 721; Sabin *v.* Heape, 27 Beav. 553. Where a bill was filed by creditors, alleging only that the devisees in trust of real estates charged with debts had mortgaged as beneficial owners, and that the money was not applied in payment of debts, a demurrer by the mortgagees was overruled. But Turner, L. J., dissented, on the ground that notice of the intended application of the money was not sufficiently imputed to the mortgagees by the bill, and that doubt ought not to be thrown upon the rights of such devisees to deal with their testator's estates. Collingwood *v.* Russell, 10 Jur., N. S. 1062.

(*i*) 3 & 4 Will. 4, c. 104.

(*k*) Kinderley *v.* Jervis, 22 Beav. 1.

(*l*) Per Lord Eldon in Bootle *v.* Blundell, 1 Mer. 233.

(*m*) Allan *v.* Backhouse, 2 V. & B. 65; Jac. 631; Playters *v.* Abbott, 2 M. & K. 97; see Garmstone *v.* Gaunt, 9 Jur. 78.

(*n*) Solley *v.* Wood, 29 Beav. 482.

although it seems the trustees, in the exercise of their power, might have made a different disposition (*o*).

434. Trustees are also now authorized by statute (*p*), in case any money shall be required for the purpose of paying for equality of exchange, or for the renewal of any lease authorized by the act, if they shall not have in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or of which the lease is to be renewed, sufficient money for the purposes aforesaid, to raise the same by mortgage of the hereditaments to be received in exchange or contained in the renewed lease, or of any other hereditaments subject to the uses or trusts subsisting in the hereditaments taken in exchange, or comprised in the renewed lease, with the same powers of conveyance or assurance as are contained in the act with reference to a conveyance on sale; and no mortgagee advancing money on a mortgage purporting to be made under the power, shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

435. A power for trustees to mortgage is also sometimes implied in a power to sell (*q*), viz., where to satisfy the terms, or the proposed object of the power—as for instance, to raise a particular charge, subject to which the estate is devised—it is not necessary to make an absolute conversion. But a mortgage cannot be made under an absolute trust for sale, with power to buy in and resell, as may appear most beneficial (*r*). And if the raising of a charge by sale be forbidden, the prohibition extends also to the raising it by mortgage, which may cause the loss of the estate by sale or foreclosure (*s*).

Where trustees are empowered to sell or mortgage, it is considered that they cannot sell after mortgaging (*t*).

(*o*) Jones *v.* Jones, 5 Hare, 440; Ainslie *v.* Harcourt, 28 Beav. 313.

(*p*) 23 & 24 Vict. c. 145, s. 9.

(*q*) Mills *v.* Banks, 3 P. W. 9; Haldenby *v.* Spofforth, 1 Beav. 390; Stroughill *v.* Anstey, 1 De G., M. & G. 635; Page *v.* Cooper, 16 Beav. 396; Earl of Oxford *v.* Albermarle, 17 L. J., N. S., Ch. 266.

(*r*) Devaynes *v.* Robinson, 24 Beav. 86; 3 Jur., N. S. 1143.

(*s*) Bennett *v.* Wyndham, 23 Beav. 521; 3 Jur., N. S. 707, 1143.

(*t*) Palk *v.* Clinton, 12 Ves. 48; see Omerod *v.* Hardman, 5 Ves., jun. 722.

436. Trustees who are empowered to raise money by mortgage for the payment of debts and legacies may raise it without first obtaining a decree (*u*): and a mortgage may be made where a term has been created for raising money out of rents and profits, or where there is a mere declaration that the estate is charged with payment of the money, though the trustees be directed to enter and receive it out of the rents (*x*); and notwithstanding the existence of a legal right to recover the arrears of an annuity by entry and distress, the Court of Chancery will direct them to be raised by sale or mortgage (*y*).

Where the person who creates the security creates it under a trust or power, the question may arise whether without special authority he can insert in it a power of sale. It appears now to be settled that a personal representative mortgaging the leasehold of his testator or intestate (*z*), or a trustee with power to raise money by sale or mortgage of real or leasehold property, or by mortgage of chattel property, which from its nature can be dealt with only by bill of sale, or some kindred form of security, may add to the mortgage a power of sale (*a*), though it is not a breach of trust to omit to do so (*b*). Where there was a mere power to trustees to mortgage real estate, it was held that they could not give a power of sale; because a power to mortgage does not in general include a power to sell, and the donee of a power cannot confer a right which he does not possess (*c*). It seems, nevertheless, to be considered by Lord Romilly, M.R., that the power to mortgage carries a right to insert a power of sale, unless expressly excluded, on the ground of expediency, because the loan can be so raised on better terms (*d*). Upon this principle

(*u*) Earl of Bath *v.* Earl of Bradford, 2 Ves. 587.

(*x*) Countess of Shrewsbury *v.* Earl of Shrewsbury, 1 Ves., jun. 227; Green *v.* Belcher, 1 Atk. 505.

(*y*) Cupit *v.* Jackson, 13 Price, 721.

(*z*) Saunders *v.* Richards, 2 Col. 568.

(*a*) Russell *v.* Plaice, 18 Beav. 21; 18 Jur. 254; Bridges *v.* Longman, 24 Beav. 27; Clarke *v.* Panopticon, 3 Jur., N. S. 178.

(*b*) Farrar *v.* Barraclough, 2 Sm. & G. 231. And an attorney is not liable for negligence if he omit to take it. (Bailey *v.* Abraham, 14 L. T. 219.)

(*c*) Clarke *v.* Panopticon, supra; see Drake *v.* Whitmore, 5 De G. & S. 619.

(*d*) See Bridges *v.* Longman, supra, but the settlement contained a power to sell. See also Cook *v.* Dawson, 29 Beav. 128; 7 Jur., N. S. 130; 3 De G., F. & J. 127.

authority has been given to insert the power in a mortgage of infants' real estate for the payment of debt and costs (*e*).

If property be bought subject to an agreement under which the vendor is bound to mortgage it to a third person, and afterwards the mortgage be made with a power of sale, the power will be good against the purchaser from the mortgagor, and he will be declared to be a trustee of the legal estate for the purchaser from the mortgagee under the power (*f*).

Where a conveyance, absolute in form, is ordered to stand only as a security for the sum found due, a power of sale is not considered to be imported into it (*g*).

437. The power which is vested in an executor or administrator, by virtue of his office, of raising money by sale of the leasehold and other personalty of the testator, for the purposes of the trust, also enables him to raise money by mortgage or pledge of the personalty, even though it be specifically bequeathed; and unless the transaction affords intrinsic evidence that the executor is not acting fairly in the execution of his duty (as where the consideration is the payment of a debt personally due from the executor to the mortgagee, or the latter has notice that it is borrowed in breach of trust for an intended misapplication) the mortgagee has a right to infer that the executor is so acting, and is not bound to inquire as to debts and legacies (*h*). The power of the executor in this respect corresponds with the power which arises to a trustee, where there is a charge of debts and legacies upon real estate (**430**).

438. A charge of debts upon real estate, contained in a will which also directs the executors to carry on the testator's business, does not authorize them to mortgage the real estate, which was not employed at his death in the business, for the

(*e*) Selby *v.* Cooling, 23 Beav. 418; Drake *v.* Avery, cited there.

(*f*) Leigh *v.* Lloyd, 35 Beav. 455; 34 L. J., Ch. 646; 2 De G., J. & S. 330.

(*g*) Pearson *v.* Benson, 28 Beav. 598.

(*h*) Mead *v.* Lord Orrery, 3 Atk. 235; Ewer *v.* Corbet, 2 P. W. 148; M'Leod *v.* Drummond, 17 Ves. 153; Keane *v.* Robarts, 4 Mad. 332; Watkins *v.* Cheek, 2 Sim. & St. 199; Russell *v.* Plaice, 18 Beav. 21; 18 Jur. 254; see Taylor *v.* Hawkins, 8 Ves. 209; Haynes *v.* Forshaw, 17 Jur. 930; 11 Hare, 93; Braithwaite *v.* Britain, 1 Keen, 206; Collinson *v.* Lister, 20 Beav. 356; 7 De G., M. & G. 634.

payment of debts incurred in carrying it on under the will (*i*); nor it seems can a power to borrow money on mortgage be exercised for securing an existing debt; though a security so made in excess of a power, but by which the estate passes, will be treated as valid (*k*) in a foreclosure suit, and must be set aside, if at all, by an independent proceeding (*l*).

(*i*) M'Neillie *v.* Acton, 17 Jur. 1041; 4 De G., M. & G. 744.

(*k*) Scott *v.* Colburn, 26 Beav. 276; 5 Jur., N. S. 183.

(*l*) The rules as to the investment of trust money upon mortgage belong rather to the law of trusts than of mortgages; but it may be convenient to state them shortly.

Trustees, executors or administrators, where not expressly forbidden to do so, may now invest trust funds upon real security in any part of the united kingdom, without being liable for breach of trust, provided the investment be in other respects reasonable and proper (22 & 23 Vict. c. 35, s. 32, made retrospective by 23 & 24 Vict. c. 38, s. 12); and trustees who are empowered to invest upon mortgage of land in "England, Wales or Great Britain," may also, unless expressly forbidden to do so, invest upon land in Ireland (4 & 5 Will. 4, c. 29), the securities being enforceable by courts of equity in England. But the Court of Chancery, although not holding a trustee liable for breach of trust, who either under statutory or other power has made such an investment with due precaution, will not, except under special circumstances, authorize the investment upon real security of the money of infants (Norbury *v.* Norbury, 4 Mad. 191; Re Ridgways, 1 Hog. 309), or of lunatics; except under special circumstances; as where the lunatic has an interest in the property, and it will be beneficial to relieve the family estate. (Ex parte Cathorpe, 1 Cox, 182; Ex parte Ellice, Jac. 234; Ex parte Johnson, 1 Mol. 128.) The same rule is applied generally to trust funds under the control of the court. (See Baud *v.* Fardell, 7 De G., M. & G. 633.) It seems that notwithstanding the statutory power the court will not advise trustees to lay out money upon mortgage of land in Scotland (In re Miles, 27 Beav. 579), nor accede to an Irish mortgage under the act of 4 & 5 Will. 4. (Stuart *v.* Stuart, 3 Beav. 430.)

A mortgage within a power by which trustees are authorized to invest upon mortgage, ought it seems to be one under which they will have a remedy by ejectment; they are not justified in taking a second mortgage. (See Norris *v.* Wright, 14 Beav. 291; Drosier *v.* Brereton, 15 id. 221; Mortimore *v.* Mortimore, 4 De G. & J. 472.) And they must be careful that the security be of sufficient value; in which respect it is understood that they will neglect their duty if they lend more than two-thirds of the value of freehold agricultural land, or one half of the value of freehold houses; and even this it seems is too large a proportion if the property be used for trade purposes. (Stickney *v.* Sewell, 1 M. & C. 8; M'Leod *v.* Annesley, 16 Beav. 600; Farrar *v.* Barraclough, 2 Sm. & G. 234; Phillipson *v.* Gatty, 7 Hare, 516; Stretton *v.* Ashmall, 3 Dr. 9.) If the property consist of renewable leaseholds, subject to a heavy rent, although it may be treated as freehold, yet as the rent must be paid whatever the variation in the value of the property, the advance ought not to be on a higher scale than upon freehold houses. (M'Leod *v.* Annesley, supra.) In the case of ground rents however, the court does not look only at the rents, but also at the buildings which are liable for the payment of them. (Vickery *v.* Evans, 10 Jur., N. S. 30.)

Of Securities by Agents—Factors.

439. An implied power to mortgage or pledge is sometimes vested in persons as agents over property of which they have only a temporary control without any right of property. As a general rule, the control which an agent has over his principal's property does not authorize him to pledge it. It is therefore laid down (*m*) that a solicitor cannot without authority, express or to be implied from strong circumstances, either pledge his client's deeds or do anything to prejudice his estate or interest under them. Exceptions to the general rule have arisen from necessity, and by the custom of trade, and have in some cases been authorized and regulated by statutes. One notable exception, founded upon necessity only, is the power to hypothecate the ship which is vested in the master, and this has already been considered under the head of bottomry, which is the only form in which the power can be exercised (**109**). Some others will now be considered.

440. Before the passing of certain acts of parliament known as the Factors Acts, the law was that although a consignee, factor or other agent intrusted with the possession of goods for the purpose of sale, might to the extent and with notice of his own lien give security by delivering them to another to hold for him in his name and as a continuance of his own possession (*n*); yet a tortious pledge by the factor was of no avail against the true owner of the goods: upon the principle that he who gives credit to another must be vigilant in ascertaining his debtor's right to pledge (*o*). The owner, therefore, upon tender of what was due to the factor could recover the proceeds of the sale of the goods from the pawnee, without regard (*p*) to the advances made by the latter to the factor; and the delivery of the goods or bill of lading by the broker for the purpose of sale, to a third person, who made advances in anticipation of the sale, was treated as a pledging of the goods; though the possession so given, being in accordance

(*m*) Per Turner, L. J., in Cory *v.* Eyre, 1 De G., J. & S. 168.

(*n*) M'Combie *v.* Davies, 7 East, 5.

(*o*) Paterson *v.* Task, Str. 1178; Queiroz *v.* Trueman, 3 B. & C. 342.

(*p*) Daubigny *v.* Duval, 5 T. R. 604.

with the object of the original consignor, was legal (*q*). Nor was an authority to pledge considered to be implied (*r*) by a direction to the factor to deal with the goods at his discretion; or by reason that the principal drew against the factor, or requested him to make remittances in anticipation of the sales: nor to be included in a direct authority to sell, assign and transfer (*s*).

441. The first of the Factors Acts (*t*) legalized pledges by consignees of goods, or the bills of lading thereof, but limited the interest of the pledgee to the amount of that possessed by the pledgor at the time of the deposit or pledge. It also gave express power (*u*) to the owner of the goods to recover them from the factor or his assignees in bankruptcy, before the pledge; and to recover them after the pledge from any person, on repayment of the money or restoration of the negotiable security, or its value, for which such person might have a lien, and also to recover the balance of the proceeds of sale after deducting the sum advanced. And in case of the bankruptcy of the factor, it was declared that the debt due from the owner of the goods pledged, to the bankrupt's estate, should be considered as discharged pro tanto.

442. By another act (*x*), persons intrusted with and in possession of bills of lading and other specified documents of title to goods, were to be considered as the true owners of the goods described in the documents, so far as to give validity to any contract or agreement by them for the sale or disposition of such goods, or the deposit or pledge thereof (*y*) as security for money or negotiable securities advanced on the faith of the documents by any person not having notice that the pledgor was not the actual and bonâ fide owner. But where (*z*) the security was taken for an antecedent debt, or where, under the permission given by the act, it was taken

(*q*) Newsom *v.* Thornton, 6 East, 17; Kuckein *v.* Wilson, 4 B. & Al. 443; Martini *v.* Coles, 1 M. & S. 140.

(*r*) Graham *v.* Dyster, 6 M. & S. 1; 2 Stark. 21; Queiroz *v.* Trueman, supra.

(*s*) De Bouchont *v.* Goldsmid, 5 Ves. 210.

(*t*) 4 Geo. 4, c. 83, s. 2.

(*u*) Sect. 3.

(*x*) 6 Geo. 4, c. 94, s. 2.

(*y*) See Taylor *v.* Kymer, 3 B. & Ad. 320.

(*z*) 6 Geo. 4, c. 94, ss. 3, 5.

with notice that the pledgor was but a factor or agent, no further right could be acquired than was possessed by the pledgor at the date of the pledge. This, like the former act, provided (*a*) for the recovery of the goods by the owner both before and after the pledge, and of the balance of the proceeds of sale, and for the discharge pro tanto of the debt to the factor's estate in the event of his bankruptcy. And it declared (*b*) the pledge of goods or documents by the factor, and the appropriation of the consideration to his own use, in violation of good faith and with intent to defraud, to be a misdemeanor. But it provided, that there should be no prosecution where the pledge was not for a greater sum than at the time of the pledge was due to the principal; and the acceptance of bills drawn by or on account of the principal, was not to constitute a debt from the principal so as to excuse the pledge, unless the bills were paid when they became due.

443. It will be observed, that this statute only applied to documents of title to goods, not to the goods themselves, and to pledges of such documents only as the owner had intrusted to the factor, not to those created by the factor himself: such as wharfingers' receipts and dock warrants obtained by the factor in his own name, upon landing goods consigned to him for sale (*c*). It also gave validity (*d*) to sales by known agents, made in the usual course of business, and without notice that the agent had no authority to sell. And by a third act (*e*), which recited an intention to put pledges by agents upon the same footing as such sales, it was declared that any agent who should thereafter be intrusted with the possession of goods (*f*), or of the documents of title to goods, should be taken to be the owner so far as to give validity to any bonâ fide contract by way of pledge, lien or security, as well for original as for further advances; and that such security should be binding on owners, though the person claiming the pledge or lien might have had notice of the agency.

(*a*) Sect. 6.

(*b*) Sects. 7, 8.

(*c*) Close *v.* Holmes, 2 Moo. & R. 22.

(*d*) 6 Geo. 4, c. 94, s. 4.

(*e*) 5 & 6 Vict. c. 39, s. 1.

(*f*) The word "goods" does not include certificates of railway stock. (Freeman *v.* Appleyard, 32 L. J., N. S., Exch. 175.)

444. The statute of 6 Geo. 4 did not apply where the pledgor obtained the goods in his own right as a purchaser (*g*), or not in the character of a factor; as, for instance, in the character of a wharfinger (*h*), as distinguished from that of a person who carries on the business of buying and selling goods on account of others (*i*); and both this and the statute of Victoria, notwithstanding the generality of the latter as to agency, relate only to mercantile transactions, and do not enable a servant intrusted with chattels to effect a good security upon them, or otherwise apply to the relation of master and servant (*k*). But it is sufficient if the person intrusted be employed to sell the goods as an agent, in the manner in which the business of conducting such sales is commonly carried on, although such be not his ordinary employment (*l*). Contracts for pledge, lien or security, in consideration of delivery or transfer to the agent of any other goods or documents of title or negotiable security, upon which the person delivering them up had then a valid and available lien or security for a previous advance by virtue of a bonâ fide contract with such agent, are contracts within the meaning of the act of Victoria, and as valid as if the consideration had been for a present bonâ fide advance of money (*m*): provided that the lien acquired upon the goods or documents deposited in exchange does not exceed the value at the time of the property delivered up and exchanged.

445. Under the act of Geo. 4, a factor, who had already made a pledge for an advance, could not withdraw it and substitute the warrant of his principal; because, there being no advance on the faith of the warrant, the exchange of other warrants, on the security of which an advance had been previously made, was considered to be tortious (*n*).

446. It seems, that where one has made a pledge on the

(*g*) Jenkins *v.* Usborne, 7 Man. & G. 678; 8 Sc. N. R. 505.

(*h*) Monk *v.* Whittenbury, 2 B. & Ad. 484.

(*i*) Baines *v.* Swainson, 32 L. J., N. S., Q. B. 281; 4 B. & S. 270.

(*k*) Wood *v.* Rowcliffe, 6 Hare, 183, 191; Lamb *v.* Attenborough, 8 Jur., N. S. 280; 1 B. & S. 831.

(*l*) Heyman *v.* Flewker, 13 C. B., N. S. 519; 9 Jur., N. S. 895.

(*m*) 5 & 6 Vict. c. 39, s. 2.

(*n*) Bonzi *v.* Stewart, 4 Man. & G. 296; 5 Sc. N. R. 1.

guarantee of another for payment of a debt, and the guarantor afterwards becomes intrusted with goods within the meaning of the act of Victoria, he can substitute those goods in lieu of the original pledge of the person for whom he was guarantor (*o*). A guarantee by an agent is equivalent to a contract within the meaning of the act, and the fact that the goods delivered in exchange were not the goods of or delivered by the original pledgor does not take the case out of the statute.

447. The act of Victoria (*p*) only protects loans, advances and exchanges made bonâ fide and without notice that the agent has no authority to contract, or is acting malâ fide against the owner. The circumstances, a knowledge of which where there is no evidence of direct communication, will constitute notice of want of authority or mala fides, must be such that the fact would be inferred by a reasonable man of business, who has applied his understanding to the matter (*q*). But mere suspicion will not affect the transaction. The question of mala fides is for the jury, and the facts of want of good faith, of want of authority and of notice, should be found by them categorically (*r*).

448. Notice that the factor holds the goods for sale, is not notice of mala fides in the pledge under this statute; nor is it material that the agent intrusted with the goods obtained them by fraud from the owner, or that the advances on them were not made in the usual course of business (*s*). The statute assumes that the advances were so made. But if the consignee obtain a loan to enable him to pay a debt to which he and the lender were jointly liable, and pledge the goods to the latter as security; this being no real loan, but only a contrivance to pay the debt, is not protected by the statute (*t*).

(*o*) Sheppard *v.* Union Bank of London, 8 Jur., N. S. 265; 7 H. & N. 661.

(*p*) 5 & 6 Vict. c. 39, s. 3.

(*q*) Navulshaw *v.* Brownrigg, 2 D. G., M. & G. 441; Gobind Chunder Sein *v.* Ryan, 9 Moo., Ind. App. 140; 8 Jur., N. S. 343; see Evans *v.* Trueman, 1 Moo. & R. 10, on Statute of 6 Geo. 4.

(*r*) Id.; Douglas *v.* Ewing, 6 Ir. C. L. R. 395.

(*s*) Navulshaw *v.* Brownrigg, 1 Sim., N. S. 573; 2 De G., M. & G. 441; Sheppard *v.* Union Bank of London, 8 Jur., N. S. 265; 7 H. & N. 661.

(*t*) Learoyd *v.* Robinson, 12 M. & W. 745.

449. A lien or pledge for a debt already due from the agent to the holder of the lien or pledge is not protected; nor is the agent authorized to deviate from the express orders or authority of the owner (*u*).

450. The expression "documents of title" includes (*x*) bills of lading, India warrants, warehouse keepers' certificates, warrants or orders for delivery of goods, or any other document used in the course of business as proof of the possession or control of goods, or authorizing by indorsement or delivery the possessor of the document to transfer or receive goods thereby represented.

451. Any agent intrusted as aforesaid and possessed of any documents of title, whether derived immediately from the owner of the goods, or obtained by reason of the agent having been intrusted with the possession of goods, or of any document of title thereto, is "intrusted" with the possession of the goods represented by the document of title (*y*); a provision in which the word "intrusted" has a much larger meaning than in the act of 6 Geo. 4, under which it was necessary to show, not only that the owner intended the factor to have possession at the time of the pledge, but that he should have it under such circumstances that an actual trust could be inferred; so that possession of a dock warrant obtained by the factor, without the knowledge and against the intention of the owner, would not support a pledge effected by means of such possession (*z*). All contracts, pledging or giving a lien upon such documents of title, are deemed to be pledges of and liens upon the goods to which the same relate; and the agent is "possessed" of such goods or documents, whether the same shall be in his actual custody or held by any other person, subject to his control or for him or on his behalf; and where any loan or advance shall be bonâ fide made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing to consign, transfer or deliver such goods or

(*u*) 5 & 6 Vict. c. 39, s. 3.
(*x*) Sect. 4.
(*y*) Ibid.
(*z*) Phillips *v.* Huth, 6 M. & W. 572; Hatfield *v.* Phillips, 9 M. & W. 647; 14 id. 665; 12 Cl. & F. 343.

documents, and the same shall actually be received by the person making such loan or advance, without notice that the agent was not authorized to make such pledge or security, every such loan or advance is deemed to be made on the security of such goods or documents within the meaning of the act, though such goods or documents shall not actually be received by the person making such loan or advance till a period subsequent thereto; and any contract or agreement, whether made direct with such agent or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such agent; and any payment made, whether by money, bills of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the act.

The agent in possession is also considered to be intrusted with goods, unless the contrary be shown in evidence (*a*).

452. The civil responsibility of the agent, for breach of duty in respect of any contract, agreement, loan or pledge, is not affected by the act of Victoria (*b*). The misdemeanor clause of this act has been repealed, and more fully re-enacted (*c*); with a provision, which was also contained in the act of 5 & 6 Victoria (*d*), that the clause shall not apply in case the goods or documents of title shall not be made a security for or subject to the payment of any greater sum of money than the amount which, at the time of the consignment, deposit, transfer or delivery, was justly due to the agent from his principal, together with the amount of any bills of exchange drawn by or on account of the principal and accepted by the factor or agent. The payment of the bills is not made necessary.

453. The owner may redeem before sale (*e*), on re-payment of the lien or restoration of the security and re-payment of the agent's lien; or may recover the balance of the produce of the sale of the goods from the pledgee or owner of the lien, after deducting the amount of the lien. And in case of

(*a*) Sect. 4.
(*b*) Sect. 5.
(*c*) 24 & 25 Vict. c. 95, and c. 96, s. 78.
(*d*) 5 & 6 Vict. c. 39, s. 6.
(*e*) Sect. 7.

the bankruptcy of the agent, the owner of the goods redeemed is held (*f*), as to the sum paid on account of the agent for redemption, to have paid it for the use of the agent before the bankruptcy. Or, if the goods shall not be redeemed, the owner shall be deemed to be a creditor of the agent for the value of the goods pledged at the time of the pledge; and may prove for or set off the sum paid, or the value of the goods, as the case may be.

No validity is given to pledges made before the passing of the act (*g*).

Of Securities by Bankers and Bill-brokers.

454. Bankers, to whom negotiable securities are intrusted by their customers for the purpose of receiving the proceeds, can make a good pledge to a person taking honestly as against the customer (*h*). The security will, of course, be invalid if the pledgee have notice of the want of authority, and such notice is sufficiently conveyed by a special indorsement on the bill for the account of the principal (*i*); nor can the banker give a good title against the owner to securities which are not negotiable (*k*).

455. A bonâ fide advance to a bill broker, on the deposit of bills, will also confer a good title, where the pledgee has no notice that they were held merely for the purpose of discount. But no such right will be conferred where the bills are deposited to secure money already due from the broker. The bill broker, in the absence of evidence as to the nature of his employment, is considered as an agent for procuring a loan of money on each bill separately; and according to the general law he has no right to risk the detention of the bill of one customer for losses arising from the dishonoured bills of another, by mixing the bills and pledging the mass for an

(*f*) Sect. 7; and 12 & 13 Vict. c. 106, s. 179.

(*g*) 5 & 6 Vict. c. 39, s. 9.

(*h*) Collins *v.* Martin, 1 Bos. & P. 648; Ex parte Pease, 19 Ves. 25. The bond of a foreign prince, payable to the holder for the time being, and proved to be negotiable like an exchequer bill, falls within the rule as to negotiable securities.

(*i*) Treuttel *v.* Basandon, 8 Taunt. 100.

(*k*) Glyn *v.* Baker, 13 East, 509.

entire sum. But where a custom so to mix and pledge the bills is proved to exist (as it does in London), it is upheld, and the pledgee is considered to be safe if he have honestly taken the bills for value in the course of business, though without any special precaution (*l*).

Of Securities by Partners.

456. Any one of several partners, or persons associated as partners in a particular transaction, may pledge or make a security affecting the personal property of the partners, for a loan or debt contracted for the ordinary purposes of the undertaking, where there is no notice of fraud or want of authority (*m*). And this power continues after the dissolution of the partnership for the purposes of winding up the affairs and of contracts entered into during its continuance (*n*). But the partnership will not be bound by a security given by one of the firm to a person who knowingly makes advances for extraordinary purposes; such as raising additional capital for payment of the share of a deceased partner, or making new arrangements for carrying on the business (*o*). Nor, à fortiori, can one member of a firm bind the others by a security for the payment of his separate debt, unless the creditor can prove a direct assent by the other partners, or circumstances from which such assent may reasonably be inferred. The presumption is, that such a security was known by the creditor to have been given without the authority of the firm, and he takes the onus of proving the authority (*p*).

457. If one of several partners give separate security for

(*l*) Haynes *v.* Foster, 2 Cr. & M. 237; Foster *v.* Pearson, 2 C., M. & R. 849.

(*m*) Raba *v.* Ryland, Gow. 132; Tupper *v.* Haythorne, cited 135, id. n.; Ex parte Bonbonus, 8 Ves. 540; Reid *v.* Hollinshead, 4 B. & C. 867; Ridley *v.* Taylor, 13 East, 175; Ex parte Bosanquet, De G. 432; Ex parte Howden, 2 M., D. & De G. 574.

(*n*) Butchart *v.* Dresser, 10 Hare, 453; 4 De G., M. & G. 542.

(*o*) Fisher *v.* Taylor, 2 Hare, 219.

(*p*) Snaith *v.* Burridge, 4 Taunt. 684; Ex parte Thorpe, 2 Deac. 16; Frankland *v.* M'Gusty, 1 Knapp, P. C. 274; Levieson *v.* Lane, 9 Jur., N. S. 670; 13 C. B., N. S. 278, notwithstanding the dictum of Lord Ellenborough in Ridley *v.* Taylor, supra. But the partner who has improperly made the pledge cannot take advantage of his want of power and repudiate his own act. (Brownrigg *v.* Rae, 5 Exch. 489; see Gordon *v.* Ellis, 7 Man. & G. 607; Hawker *v.* Hellewell, 3 Sm. & G. 194.)

advances to himself, the security will cover advances on account of the firm, if it can be shown that the original pledge was made to secure a partnership debt (*q*). But where the security clearly relates to a separate debt, the mere existence of partnership dealings in connection with the money raised, without evidence to connect the security with such dealings, will not entitle the creditor to retain the security for money due from the partnership; and it makes no difference that the property which formed the separate security has afterwards become vested in the firm (*r*).

Upon the death of a partner, whose separate property is liable for a partnership debt, the dissolution of the partnership prevents the continuance of the security for further advances; and if the dealings continue with the surviving partners, any subsequent payments to the creditor will go in discharge of the part of the original debt which was due from the deceased partner (*s*).

458. There appears to be no express authority as to the right of a partner to create an equitable security on the real estate of the firm. Such property for most purposes is personalty as between the partners and their representatives; but the remark of Lord Kenyon (*t*), that if a firm could be bound (which he held it could not) by the deed of one of the partners unauthorized by the others, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners, shows that no such security can be given.

459. The benefit of a security to a partnership belongs originally only to those partners who were members of the firm when it was given (*u*), but may be extended to the members for the time being on a verbal or other express or constructive agreement, or on evidence of intention that future

(*q*) Chuck *v.* Freen, 1 Moo. & Malk. 259, notwithstanding Ex parte Freen, 2 Gl. & J. 246, where the Vice-chancellor refused to admit evidence of the parol arrangements.

(*r*) Ex parte M'Kenna, 7 Jur., N. S. 588.

(*s*) Bank of Scotland *v.* Christie, 8 Cl. & Fin. 214.

(*t*) Harrison *v.* Jackson, 7 T. R. 207.

(*u*) Ex parte Kensington, 2 Ves. & B. 80; Eyton *v.* Knight, 2 Jur. 8.

partners should share the benefit of it (*x*). The security of a legal mortgage to three partners was thus extended to advances made by either of them, or by them and a fourth partner, on the authority of a letter, addressed to the firm after the fourth partner became a member, authorizing them to hold the securities in their hands to cover advances made or to be made to the mortgagor (*y*). And where a deposit was made to secure future advances, and there was an account current by reason of which the actual debt arose after a change in the creditors' firm, the mere leaving the deeds in the custody of the firm, was held to operate as a fresh deposit or tacit recognition of the debt; and as evidence of an intention to continue the dealings on the same terms as before the change (*z*).

460. One part-owner of a ship, even where he fills the office of ship's husband, has no authority to pledge the vessel as against the other part-owners (*a*), though, subject to their rights and to the rights of creditors upon the ship, each part-owner may of course pledge his own share.

(*x*) Ex parte Marsh, 2 Rose, 239; Ex parte Lloyd, 1 Gl. & J. 389; Ex parte Ford, 3 M., D. & De G. 457.

(*y*) Ex parte Parr, 4 Deu. & Ch. 426.

(*z*) Ex parte Oakes, 2 M., D. & De G. 234; Ex parte Smith, id. 314.

(*a*) Guion *v.* Trask, 1 De G., F. & J. 373.

CHAPTER IV.

OF THE RIGHT OF REDEMPTION.

461. *Of the Nature and Manner of exercising the Right of Redemption.*
477. *Of the Defences to the Bill for Redemption.*
487. *Of the Time for Redemption.*
493. *Of the Statutes of Limitation.*
510. *Of the Persons entitled to redeem.*
523. *The Wife and Surety.*
526. *Joint Tenants, &c.*
528. *Tenants in Tail and for Life, and Remaindermen.*
535. *Guardians and Committees.*
537. *In Cases of Forfeiture and Escheat.*
539. *The Mortgagor's Assignees.*
544. *Judgment and other Creditors.*
549. *Assignees in Bankruptcy.*
550. *Devisees.*
552. *Real and Personal Representatives.*
564. *Members of Benefit Building Societies.*

Of the Nature and Manner of exercising the Right of Redemption.

461. The right to redeem a legal mortgage is usually vested in the mortgagor, by a proviso or condition, to the effect that if the mortgagor or his representative shall pay to the mortgagee or person entitled to receive the debt the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or person in whom the estate is vested, will, at the cost of the person redeeming, reconvey to him, or as he shall direct.

The construction of such a proviso by courts of law is thus shortly expressed by Littleton (*a*):—"If a feoffment be made, upon such condition that if the feoffor pay to the feoffee at a certain day, &c., 40*l.* of money, that then the feoffor may re-enter, . . . if he doth not pay, then the land, which is put in

(*a*) Sect. 332, and see Bac. Abr. Mortgage, 637.

pledge upon condition for the payment of the money, is taken from him for ever."

462. The legal rule is the same where chattels are mortgaged, but differs where they are only pledged (*b*); for by breach of the condition the absolute property in the pledge does not vest in the pledgee, and the pledgor's right to redeem at law is not affected.

463. The absolute loss to the mortgagor of the estate was for a long period the irremediable consequence of non-payment of the mortgage debt at the time appointed; and the doctrine is still in force at law, and exercises an important influence in the various relations which arise between the mortgagor and the mortgagee. But the harsh effect of the legal rule has been removed by the Court of Chancery (*c*), which, holding that the security of the mortgage debt and not the exact performance of the condition was the object of the transaction, permits the owner of the estate subject to the debt to redeem during an extended period, upon the equitable terms of paying the mortgagee his principal, with interest to the time of payment, and his costs; unless the period for redemption has been anticipated by the decree of the court made at the instance of the mortgage creditor, and by which the mortgagor is required to redeem at a certain day, or in default is foreclosed of his equity of redemption: or unless the equity be shut out by a sale of the estate, either made in pursuance of a decree, or by the mortgagee himself under a power contained in his mortgage.

464. This right or equity of redemption has been described sometimes as an estate (*d*) and sometimes as an

(*b*) Glanvill, book 10, cc. 6, 8; Story, Bail. §§ 345, 346; Com. Dig. 5, 149.

(*c*) The County Courts Act, 1865 (28 & 29 Vict. c. 99), enables county courts to exercise all the power and authority of the court of Chancery in suits for foreclosure or redemption, or for enforcing any charge or lien, where the mortgage charge or lien shall not exceed in amount the sum of 500*l*. Under this act, and the earlier County Courts Act (9 & 10 Vict. c. 95), the county court and the court of Chancery have concurrent jurisdiction where the parties live more than twenty miles apart, and a plaintiff will not be deprived of his right as a mortgagee to costs because he sues in the latter court. (Scott *v.* Heritage, L. R., 3 Eq. 212.)

(*d*) Casborne *v.* Scarfe, 1 Atk. 603. But it is not an estate which will enable the owner to support an action for an injury to the reversion of the mortgaged hereditaments. (Mumford *v.*

interest (*e*), or equitable right inherent (*f*) in the land; and though strictly equitable, and capable of being enforced in equity alone, it is of so much consequence in the eye of the law, that the law takes notice of it, and makes it assignable and devisable (*f*). Like the estate itself, it passes by transfer and devise; may be impressed with, and then becomes subject to, the ordinary consequences of entails and other limitations; devolves, according to the tenure of the actual estate, upon the real or personal representatives of the owner; and is subject to gavelkind, borough English and other customs which affect the ordinary legal ownership (*g*).

465. The existence of a right of redemption does not necessarily depend upon any distinct agreement, but may be inferred from the nature of the transaction. It arises where property, or the evidences of property, have been transferred as a security for the payment of money, or have come to the hands of a person subject to a condition to the like effect (**14—17**); and where the nature of the transaction is doubtful, the intention of the parties may sometimes be shown by extrinsic evidence, or may be ascertained by a jury (*h*), under an issue directed by the Court of Chancery.

466. The person who seeks redemption must show a good right to redeem, the mortgagee being entitled to hold the estate against all who cannot do so (**1393**); and if the defendant can make out a case which goes directly to show that the title is in another person than the plaintiff, the latter will not even be suffered to redeem at his peril (*i*). But a plea in bar to a redemption bill, on the ground of want of interest in the plaintiff, has been held bad, where the mortgagor had parted with his interest in the security to an assignee, for whose benefit he was seeking redemption; though the assignee must be a party to such a suit (*k*).

Oxford, Worcester and Wolverhampton Railway Company, 1 H. & N. 34.)

(*e*) Lloyd *v.* Lander, 5 Mad. 290.

(*f*) Per Hale, C. B., in Pawlett *v.* A.-G., Hardres, 465, 469.

(*g*) Anon., 2 Ch. Ca. 8; Fawcett *v.* Lowther, 2 Ves. 304; Blake *v.* Foster, 2 Ba. & Be. 387.

(*h*) Wynne *v.* Styan, 2 Ph. 303.

(*i*) Lomax *v.* Bird, 1 Vern. 182; see Francklyn *v.* Fern, Barn. Ch. 30.

(*k*) Winterbottom *v.* Tayloe, 2 Drew. 279.

467. The mortgagor will not be allowed in a redemption suit to contest the mortgagee's title before redeeming (*l*). But if the right to redeem be fairly dependent on the validity of an instrument, there will be no declaration as to the terms of redemption until the question of validity has been settled (*m*). A trial at law to settle the right may be granted, where a presumption of a plain adverse title to the equity is made out; as where (*n*) a person claiming to redeem under the heir general, the defendant set forth a deed of entail, by virtue of which the title appeared to be in another; but a trial will not be granted merely that a defendant, who has produced no evidence of his own title, may have an opportunity of contesting the plaintiff's claim, especially if the claimant have been in possession as assignee of the mortgage, with knowledge of such claim (*o*).

The court, on the other hand, will act upon a primâ facie title shown by the plaintiff, however complicated it may be, if it be supported by satisfactory evidence, and be uncontradicted, except by a mere allegation of an adverse claim; considering that the only matter determined is the right of redemption, the decree for which will not hinder an adverse claimant from asserting his title, at law or in equity, in another proceeding (*p*).

468. Adverse claimants of the equity of redemption cannot generally sue as co-plaintiffs (*q*), because no decree can be made as between them; nor can they sue under an agreement, or an allegation of an agreement, to divide the property, because such an agreement is illegal concerning an estate of which the contracting parties are not in possession. But where the safety of the security itself is the object of the suit, the mortgagee and the persons entitled to the equity of redemption may sue together as co-plaintiffs; as in a suit under the ejectment statutes in Ireland against the lessor to redeem the estate on eviction for non-payment of rent (*r*).

(*l*) Smith *v.* Valence, 1 Rep. in Ch. 90.

(*m*) Blake *v.* Foster, 2 Ba. & Be. 387.

(*n*) Lomax *v.* Bird, 1 Vern. 182.

(*o*) Lloyd *v.* Wait, 1 Ph. 61.

(*p*) Lloyd *v.* Wait, supra; Pym *v.* Bowreman, 3 Sw. 241, note; and see 2 Hare, 118, note (*b*).

(*q*) Cholmondeley *v.* Clinton, 4 Bligh, 1.

(*r*) Malone *v.* Geraghty, 3 Dru. &

469. A mortgagee whose claim is prior to that of the plaintiff and whose title is not impeached, can only be brought before the court for the purpose of redemption; and the bill of any person entitled to redeem, whether the title be by devise, assignment, judgment or otherwise, and though it touch only part of the mortgaged estate, is open to demurrer on the part of the prior mortgagee, unless it contain an offer to redeem him (*r*) (**1050**). The rule is the same when a decree for sale, and not for foreclosure, is sought; as has been laid down in reference to the practice in Ireland (*s*) (**974**). And also where the plaintiff is a trustee; because the act of the mortgagor in creating a trust ought not to change the mortgagee's rights; and the trustee incurs no personal responsibility, except by dismissal with costs, in case of non-payment at the proper time (*t*). And so where the suit is for the administration of trust property, though part of the trust estate has been improperly included in the mortgage (*u*).

It has been doubted (*v*) whether, if there were no offer to redeem, where redemption is necessary, a dismissal of the bill would, according to the usual course of practice, have the effect of foreclosure (**1882**). But it is submitted that such a doubt ought not to prevail; for the offer to redeem is merely a matter of form. If the bill make a case for, without praying redemption, the court will give leave to amend (*x*), and will not even listen to the objection if made for the first time at the hearing, but will supply the omission, obliging the plaintiff to undertake to redeem according to the usual course (*y*). But the rule that foreclosure shall follow dismissal upon non-redemption is a substantial right belonging to the mortgagee,

War. 239, 261; and see 15 & 16 Vict. c. 86, s. 49, as to the effect of misjoinder.

(*r*) Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Dalton *v.* Hayter, 7 Beav. 313; Inman *v.* Wearing, 3 De G. & S. 729; M'Donough *v.* Shewbridge, 2 Ba. & Be. 555; Tasker *v.* Small, 3 Myl. & Cr. 63; Pearse *v.* Hewitt, 7 Sim. 471; Gordon *v.* Horsfall, 11 Jur. 569; 5 Moo. P. C. 393.

(*s*) M'Donough *v.* Shewbridge, 2 Ba. & Be. 555; and see Foster *v.* Ker, 12 Ir. Eq. R. 54.

(*t*) M'Donough *v.* Shewbridge, 2 Ba. & Be. 555.

(*u*) Eaton *v.* Hazel, 1 W. R. 87.

(*v*) Inman *v.* Wearing, 3 De G. & S. 734.

(*x*) Palk *v.* Clinton, 12 Ves. 49.

(*y*) Balfe *v.* Lord, 2 Dr. & War. 480.

corresponding to his right to foreclosure upon non-redemption where he is himself the plaintiff, and ought not to be affected by the mortgagor's omission to make a formal offer to perform the condition, upon which the court gives him relief.

470. The bill must, however, relate to the very estate which is comprised in the security; for if it relate to different property, which has been made subject to or mixed up with the mortgage debt, by a deed to which the mortgagee was no party, and the suit cannot be effectual without his presence, he may be joined without any offer to redeem him. Therefore where estates had been conveyed upon trust to sell, and pay off the mortgage debt, so as to exonerate the mortgaged estate, and it was charged that the mortgagee claimed an interest in the trust estate, it was held (*z*) to be unnecessary to offer to redeem him. And the prior mortgagee, if he be a necessary party in respect of accounts, may waive the redemption of his security, in which case the decree should be prefaced by a statement that he consents not to be redeemed, and to allow his debt to remain a charge upon the estate (*a*).

471. The offer to redeem is unnecessary, where by the concurrence of the mortgagee in a deed by which the estate is vested in trustees for payment of the incumbrances, and subject thereto upon trusts affecting the equity of redemption, another relation than the simple one of mortgagor and mortgagee has been created. In such a case a person who acquires a subsequent interest in the equity of redemption, whether by way of mortgage or judgment, may sue for an account and for the execution of the trust; joining the prior mortgagee without offering payment (*b*).

472. If the bill be against the grantee of an annuity in possession of the estate, for an account of rents and profits, the plaintiff must offer to redeem on the terms of the annuity deed; or, if time have altered the circumstances, then upon (*c*)

(*z*) Dalton *v.* Hayter, 7 Beav. 313.

(*a*) Lord Kensington *v.* Bouverie, 19 Beav. 39.

(*b*) Jefferys *v.* Dickson, L. R., 1 Ch. App. 183.

(*c*) Knebell *v.* White, 2 Y. & C. 15; Burrowes *v.* Molloy, 2 Jo. & Lat. 521. And see Cave *v.* Foulks, 5 L. J. (N. S.) Ch. 206. An opinion has, however, been expressed by Turner, L. J., whose attention was not called to these authorities, that the only right of the prior

such equitable terms as the court shall direct. But it was held by Lord Lyndhurst, C. B., in a suit to recover possession of an estate mortgaged to secure a gambling debt, that no offer of repayment of a part of the debt, which had been bonâ fide advanced, was necessary, because, as in the case of the prayer for an account (**1570**), the filing of the bill amounted to a submission to such decree as the court should think fit to make (*d*).

473. The offer to redeem, or other equity offered by the bill, should correspond with the decree to which the party is entitled (*e*). If the offer be made by the mortgagor, in a suit by the mortgagee, not seeking foreclosure but to have his security perfected (**604**), the offer must extend to payment of all that the mortgagee claims to cover by his security, in case he establishes his right; otherwise there can be no foreclosure in case of default in payment, in pursuance of the offer; and in a suit in which that decree cannot be made, the amount of the mortgagee's debt may not be brought into question (*f*).

474. The offer must be express, and is not sufficiently indicated by the words "upon payment by the plaintiff of what shall be found due," which are consistent with a payment at any time convenient to the mortgagor (*g*); though it has been said that an allegation, that certain defendants claim an interest in the premises, may be considered as an offer to redeem those who, upon investigation, appear to have a right to be redeemed (*h*).

And, as a general rule, an offer gratuitously made by the bill or answer cannot be recalled (*i*). And a person who offered to redeem, under the belief that the debt, to which the

incumbrancer, being an annuitant, is to have the arrears of the annuity paid, and that whether his annuity be or be not repurchaseable; in the former case, the repurchase being at the option of the grantor, it would be a variation of the contract to compel repayment as the price of relief. (Knight *v.* Bowyer, 2 De G., F. & J. 421; 4 Jur. (N. S.) 569.)

(*d*) Parker *v.* Alcock, Younge, 361.

(*e*) M'Donough *v.* Shewbridge, 2 Ba. & Be. 555.

(*f*) Grugeon *v.* Gerrard, 4 Y. & C. 119.

(*g*) Harding *v.* Pingey or Tingey, 10 Jur. (N. S.) 872; 34 L. J. (Ch.) 13.

(*h*) Per Turner, L. J., Earl Mansfield *v.* Ogle, 7 De G., M. & G. 189.

(*i*) 2 Sw. 134; Bazzalgetti *v.* Battine, id. 156, note.

offer applied, was all that was secured on the estate, was held to his offer, though it proved that the property was subject to more debts than it was worth, and though he submitted to be foreclosed (*h*). But the court may in its discretion refuse to enforce the order where it would be unjust to do so (*l*), or where it is so limited in its terms as not to be strictly applicable to the state of affairs which has resulted from the hearing of the cause. Therefore, where a mortgagee disputed a lien, which was claimed upon the title deeds, in priority to his mortgage, but offered to discharge it in case the lien should be established by the court; the decision being against the lien, the plaintiff was held to be discharged of his offer (*m*).

475. Where a mortgagee is made party to a bill, the prayer for relief amounts to a prayer for redemption, because redemption is the proper relief, and dismissal will be the penalty of non-payment upon the account being taken, just as if redemption had been specially prayed (*n*) (**1790**). If the bill be so framed that it cannot be used for redemption, an offer at the bar to redeem will not set it up as a redemption bill (*o*).

476. In accordance with the rule of the Court of Chancery against the mixing of distinct matters in one suit, and because the mortgagee has an immediate right to have his accounts taken, and a time fixed for payment, and is not bound to wait the result of taking accounts, and other matters in which he has no interest (*p*), a mortgagor cannot by the same bill seek redemption of one, and foreclosure of another mortgage (*q*); and a mortgagee may demur to a bill, which, besides redemption, seeks a general administration (*r*) of the personal estate of the deceased mortgagor, and a declaration of the rights of devisees and legatees. But there seems to be no objection to a bill, by which an assignee of a mortgage of several estates, of the equity of redemption of

(*h*) Holford *v.* Burnell, 1 Vern. 448; 1 Eq. Ca. Abr. 35.

(*l*) Knight *v.* Bowyer, 3 De G., F. & J. 421; 11 Jur. (N. S.) 569.

(*m*) Pelly *v.* Wathen, 7 Hare, 352; S. C. on app. 1 D. G., M. & G. 16.

(*n*) Cholmley *v.* Countess Oxford, 2 Atk. 267; Palk *v.* Clinton, 12 Ves. 48.

(*o*) Gordon *v.* Horsfall, 5 Moore, P. C. 393; 11 Jur. 569; Cranver, &c. Co. *v.* Willyams, 35 Beav. 353.

(*p*) Pearse *v.* Hewitt, 7 Sim. 471.

(*q*) Plumbe *v.* Plumbe, 4 Y. & C. 345.

(*r*) Pearse *v.* Hewitt, supra.

one of which he is a purchaser, seeks at once specific performance and conveyance from the representatives of the mortgagor, and redemption or foreclosure against *puisné* mortgagees; for all this relief only tends to the completion of the plaintiff's title (*m*). Again, a mortgagee of several estates, each subject to a distinct prior mortgage, may in one suit pray an account against the several prior mortgagees, and foreclosure against the mortgagor, and may also call in question the propriety of a sale made by one of the prior mortgagees (*n*). So if one person be mortgagee of an estate, and of portions charged thereon, he may in the same suit foreclose the mortgagors of the portions and of the estate (*o*). And where the estate of a wife was entitled in equity to be recouped certain payments out of her husband's estate, upon which equity her executors having refused to sue, a judgment creditor of the wife filed a bill against them, a person claiming the husband's estate, and a mortgagee of the wife entitled in priority to the judgment creditor, it was held that the mortgagee was properly joined, in order that his debt might first be ascertained and paid, although the claimant under the husband was not concerned with the mortgagee's rights (*p*) **(1562)**.

Of the Defences to the Bill for Redemption.

477. The condition (*q*) or the equity of redemption may be released; and, in the case of copyholds, after the admittance of the mortgagee; for the rule, which prohibits a trustee from buying the trust estate from his cestui que trust, does not apply to a purchase by the mortgagee of the equity of redemption from the mortgagor; although, during the subsistence of that equity, he may not take from the mortgagor an interest, such as a long lease at an ordinary fixed rent, by the grant of which the value of the estate will be materially lessened, and the mortgagor will be hindered from redeeming,

(*m*) See Sober *v.* Kemp, 6 Hare, 155.

(*n*) Inman *v.* Wearing, 3 De G. & S. 729.

(*o*) Pearce *v.* Watkins, 5 De G. & S. 315.

(*p*) Lancaster *v.* Evors, 4 Beav. 158.

(*q*) Hull *v.* Sharbrook, Cro. J. 36; 1 Scriv. Cop. 195, ed. 4.

and at the same time be left exposed to a suit or action for foreclosure or for the recovery of the debt (*r*). But the right of redemption will not be defeated, if the release (which must be made in writing when the equity is an interest in the land (*s*)) were obtained by fraud or oppression, such as would invalidate a sale between an ordinary vendor and purchaser, or, if by means of the influence given by his position, the mortgagee have obtained the purchase at a nominal or insufficient price; though undervalue alone will not be sufficient to impeach the sale (*t*) (**354—361**).

478. The validity of the release may be impeached for other causes; as if it were made by an unauthorized person, as a trustee upon trust for sale (*u*); if there were no release of the covenant for payment of the debt; or if it be shown that the object was only to get possession of the estate, and that accounts were kept or other acknowledgments made of a mortgage title, after the release (*x*). So if the release were made upon a secret trust (*y*), or if there were an agreement giving a new equity to the mortgagor on repayment of the consideration; but not if the agreement were in the nature of a conditional sale of the equity, to be void upon payment at a certain day (*z*), for such an agreement must be strictly performed (**18**).

And a mere agreement for sale of the equity of redemption cannot be set up as a defence to a suit for redemption, but must be enforced by a distinct suit (*a*).

479. Possession under a decree of foreclosure inrolled is also a good defence by plea or answer to a bill to redeem, where the rights of the plaintiffs, or of those under whom

(*r*) Per Lord Redesdale in Hickes *v.* Cooke, 4 Dow, 16, and Webb *v.* Rorke, 2 Sch. & Lef. 661; Knight *v.* Marjoribanks, 2 Mac. & G. 10; Sugd. V. & P. 888, ed. 11. In Ford *v.* Olden, L. R., 3 Eq. 461, Stuart, V.-C., is said to have denied the distinction between the sale and incumbrance of the equity of redemption, which however appears to be established by good authority.

(*s*) Massey *v.* Johnson, 1 Exch. 241.

(*t*) Knight *v.* Marjoribanks, supra; Sugd. V. & P. 888, ed. 11; Ford *v.* Olden, L. R., 3 Eq. 461; Purdie *v.* Millett, Tam. 28.

(*u*) Stabback *v.* Leatt, G. Coop. 46.

(*x*) Vernon *v.* Bethell, 2 Ed. 110; Morley *v.* Elways, 1 Ch. Ca. 107.

(*y*) Morley *v.* Elways, supra.

(*z*) Ensworth *v.* Griffiths, 5 Bro. P. C. 184.

(*a*) Howells *v.* Wilson, 34 Beav. 573; 34 L. J. (N. S.) Ch. 593.

they claim, are concluded by the decree; but not otherwise, although the mortgagee on foreclosure had no notice of other incumbrances. The plea, therefore, will not hold against a bill by subsequent incumbrancers, who were not parties to the suit by which the foreclosure was effected (*b*). Under particular circumstances, however, the foreclosure will be opened, even after inrolment, and a new right will be given to redeem (**1789**).

The foreclosure cannot be pleaded until the final order has been obtained (*c*); for up to that time the estate retains the quality of a mortgage, and would not formerly pass as land, by the will of the mortgagee, made before the date of the order absolute (*d*).

480. A party to a suit in which a decree of foreclosure has been made is bound by it, though it were made in the absence of a person whose interest was not disclosed by the pleadings (*e*). And a mortgagor, defendant in that character to a foreclosure suit, is bound by the decree in that suit in respect of his interest in another character, though the other interest did not appear upon the proceedings (*f*).

But it seems that if a person whose interest has been foreclosed in a suit to which he was a party, become afterwards entitled to another interest in the same estate, derived from a person who was not a party to that suit, the owner of the newly-acquired interest may bring his suit for redemption, notwithstanding the former decree and foreclosure (*g*). But the bill ought to state the former proceedings in the foreclosure suit (*h*).

Redemption, without notice of a settlement of the mortgage, binds the issue under the settlement (*i*).

A mortgagor has been held to be bound by a decree concerning a security upon his estate, although it was made on an appeal with which he had not been served, and to which

(*b*) Nichols *v.* Short, 2 Eq. Ca. Abr. 608; 15 Vin. Abr. 478.

(*c*) Senhouse *v.* Earl, 2 Ves. 450; see Quarrell *v.* Beckford, 1 Mad. 269.

(*d*) Thompson *v.* Grant, 4 Mad. 438.

(*e*) Bromitt *v.* Moor, 9 Hare, 375.

(*f*) Goldsmid *v.* Stonehewer, 9 Hare, xxxix.

(*g*) Bromitt *v.* Moor, supra.

(*h*) Id.

(*i*) Chapman *v.* Duncombe, 2 Vern. 142.

he was not a party, his interest, however, being identical with that of the appellant. A bill for redemption brought in the English Chancery, on the footing that a certain security should be declared void, was therefore dismissed with costs (*k*), the same security having been declared valid by the Privy Council on appeal, in a Colonial suit by a *puisné* incumbrancer against the mortgagor and the first mortgagee. And it was held, that even if the mortgagor ought in strictness to have been served with the petition of appeal, and might for non-service avoid the decree, he must avoid it by a proceeding in the original suit, and not by a suit in Chancery without regard to the former decree.

481. If the mortgagor and mortgagee be both resident, and process served within the jurisdiction of the Court of Chancery, that Court will entertain a suit concerning a mortgage of land out of the jurisdiction; because *æquitas agit in personam;* and it has, therefore, refused to admit a plea (*l*) to a suit concerning the Island of Sark, that it was part of the Duchy of Normandy, having laws of its own, and under the jurisdiction of the courts of Guernsey; and it will be a further reason against the plea, if the mortgage affect the whole country, as its own courts can have no jurisdiction (*m*).

482. It is laid down (*n*), that the Court of Chancery refuses to determine the redemption of mortgages in, or other disputes concerning, the inns of court or of law, unless liberty have first been given by the benchers of the society in which the dispute has arisen; for which the reason is given, that the disputes of the societies may be terminated among themselves. The course appears to be, in all disputes concerning mortgages, to apply in the first instance to the benchers, to be admitted to redeem or foreclose; and in one report of the case referred to, it appears that an order of pension was made by

(*k*) Farquharson *v.* Seton, 5 Russ. 62.

(*l*) Toller *v.* Carteret, 2 Vern. 494; Earl of Derby *v.* Duke of Athol, 1 Ves. 202; Anon., 1 Salk. 404. But there must be an equity arising out of some privity between the parties. (Norris *v.* Chambres, 29 Beav. 246; 7 Jur. (N. S.) 59, 689.)

(*m*) 2 Vern. 495; 1 Ves. 204; and see Arglasse *v.* Muschamp, 1 Vern. 75.

(*n*) Rakestraw *v.* Brewer, 2 P. W. 511; Sel. Ca. in Ch. 55.

the benchers of Gray's Inn, reciting that the question in dispute was matter of account, which the bench was not capable of taking, and the mortgage of long standing, but that the plaintiffs were at liberty to seek their remedy in equity as they should be advised. But by another report, it appears that, after determining the right, the court ordered that the benchers should settle what was due for principal, interest and costs, and take account of the several receipts and allowances.

483. To a bill, praying that the defendant may be compelled to redeem a mortgage of an estate, in which the plaintiff is interested, and which is alleged to have been made by the defendant to A.; the defence may be set up by plea, that no part of the premises was or is subject to a mortgage made by the defendant to A. (*o*): for a negative plea will be admitted where it reduces the question to a single point (*p*). But leave will be given to amend.

484. If a paramount title be pleaded to a bill for redemption, the plea must show not only that the title is paramount, but also that it is good against the mortgage. A plea, therefore, to a bill to redeem a mortgage for a term, that the defendant is devisee of a prior term, without condition of redemption, is insufficient (*q*); for the devised term may be only a term to attend the inheritance.

And as the mortgagor is never allowed to impeach the mortgage which he has made (*r*), so the mortgagee may not allege that the title of the mortgagor under whom he claims is defective, or that a valid conveyance is not stated in the bill (*s*).

485. It has been provided by statute (*t*), that if any person shall borrow any money, or for other valuable consideration give or suffer any judgment, statute or recognizance; and shall afterwards borrow any other sum from any other person, or become indebted for other valuable consideration, and for

(*o*) Hitchens *v.* Lander, Coop. 34.
(*p*) Hall *v.* Noyes, 3 Bro. C. C. 483.
(*q*) Meder *v.* Birt, Gilb. Rep. in Eq. 185; 2 Eq. Ca. Abr. 682.
(*r*) Darcy *v.* Callan, 2 Jo. 60.
(*s*) Wroe *v.* Clayton, 9 L. J., Ch. (N. S.) 107; 8 id. 356; Roberts *v.* Clayton, 3 Anst. 715.
(*t*) 4 & 5 W. & M. c. 16, s. 2.

securing repayment or discharge thereof, shall mortgage his, her or their lands or tenements, or any part thereof, to, or to any trustee for, the said second or other lender or creditor, and shall not give notice to the mortgagee or mortgagees of the said judgment, statute or recognizance, in writing under his, her or their hand or hands, before the execution of the mortgage or mortgages; unless the mortgagor or mortgagors, his, her or their heirs, upon notice in writing under the hands and seals of the mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, attested by two or more sufficient witnesses, of any such former judgment, statute or recognizance, shall within six months pay and discharge the same, and all interest and charges due thereon, and cause the same to be vacated or discharged by record; then all equity of redemption of the said lands and tenements, as against the mortgagee, his representatives or assigns, is taken away from the mortgagor, his representatives and assigns, and the former may hold the mortgaged property as against the latter for such estate and term therein as was granted and settled to the mortgagee, as fully as if the same had been purchased absolutely and without power of redemption. And that if any person shall mortgage any lands or tenements for the security of money lent or due, or for other valuable consideration, and shall again mortgage the same or any part thereof to any other person or persons for valuable consideration (the former mortgage being in force and not discharged), and shall not discover to the second or other mortgagee or mortgagees, or some or one of them, the former mortgage or mortgages, in writing under his or their hands; then the mortgagor or mortgagors, his, her or their heirs, executors, administrators or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her or their heirs, executors, administrators or assigns, upon the said after mortgage or mortgages; but such mortgagee or mortgagees, his, her or their heirs, executors, administrators and assigns, shall and may hold and enjoy such more than once mortgaged lands and tenements, for such estate and term therein as was or

were granted and conveyed by the said mortgagor or mortgagors against him, her or them, or his, her or their heirs, executors or administrators respectively, freed from equity of redemption, and as fully as if the same had been an absolute purchase (*u*). But the act reserves the right of redemption of subsequent mortgagees (*x*).

486. The act does not affect redemption at law; and does not enable the mortgagee by an active remedy to enforce a forfeiture. Being penal, it will be strictly applied to such instruments only as fall within the technical description of a mortgage, and is therefore not applicable to a mere charge without any time fixed for redemption (though containing a covenant to execute a legal mortgage), either as the first mortgage which has been concealed, or as the second made without notice of the first (*y*).

Being limited to several mortgages of the same lands, it will not apply where new lands are added to the subsequent security, though the addition of an acre or two or the like would not exempt the case from the statute, but would be looked upon as a contrivance to evade it (*z*). It appears that, by the same rule, the statute would not apply where the subsequent mortgage is made by an assignee of an equity of redemption, though he had notice of the prior mortgage; for the original mortgagor only is mentioned.

But having been intended for the benefit of honest mortgagees, it cannot be pleaded by a person who has been guilty of fraud or ill practice. Hence, where a person distressed a mortgagor by suing him for foreclosure in the name, but without the privity, of the mortgagee, and having procured the money by a new mortgage to another, without giving him notice of a prior incumbrance, got in that mortgage, and also purchased the equity of redemption, he was not allowed to plead this statute against a person coming to redeem under the prior incumbrance (*a*).

A mortgage which has become irredeemable under the statute remains irredeemable in the hands of an assignee, and

(*u*) 4 & 5 W. & M. c. 16, s. 3.
(*x*) Sect. 4.
(*y*) Kennard *v.* Futvoye, 2 Gif. 81.
(*z*) Stafford *v.* Selby, 2 Vern. 589.
(*a*) Id.

the statute may be pleaded by him though the assignment were made in consideration of what was due for principal, interest and costs. And if such a mortgage be redeemed by a subsequent mortgagee, he shall hold the estate irredeemable (*b*).

Of the Time for Redemption.

487. A mortgage in which a time is fixed for redemption does not, by the rules of equity, become redeemable until that time has arrived, and an earlier redemption will not be compelled against the mortgagee (who may demur), even where the mortgagor offers to pay interest during the whole intervening period (*c*).

(*b*) Stafford *v.* Selby, 2 Vern. 589. In connection with this subject, it may here be noted, that by recent statutes any seller or mortgagor of land or chattels, real or personal, or choses in action, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall conceal any settlement, deed, will or other instrument material to the title or any incumbrance from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend in order to induce him to accept the title with intent to defraud, shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment for any time not exceeding two years with or without hard labour, or both; and shall also be liable in an action for damages at the suit of, or of those claiming under the purchaser or mortgagee, for any loss sustained in consequence of the concealment, or by any claim made by any person whose right was concealed by the falsification of such pedigree; and in estimating the damages, where the estate shall be recovered from such purchaser or mortgagee, regard shall be had to any expenditure by them or any or either of them in improvements upon the land. But no prosecution for any such offence shall be commenced without the consent of her Majesty's Attorney-General, or (when that office is vacant) Solicitor-General, which is not to be given without previous notice of the application for leave to prosecute to the person intended to be prosecuted, as the Attorney or Solicitor-General shall direct. The term "mortgage" includes every instrument by virtue whereof land is conveyed, assigned, pledged or charged as security for the repayment of money or money's worth *lent*, and to be reconveyed, reassigned or released on satisfaction of the debt. "Mortgagor" includes every person by whom any such conveyance, assignment, pledge or charge shall be made; and "mortgagee" every person to whom, or in whose favour any such conveyance, assignment, pledge or charge is made or transferred. "Judgment" includes registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments. (22 & 23 Vict. c. 35, ss. 24, 25; and 23 & 24 Vict. c. 38, s. 8.)

(*c*) Brown *v.* Cole, 14 Sim. 427; and see Burrowes *v.* Molloy, 2 Jo. & Lat. 521. See the statutory exception under 8 & 9 Vict. c. 18, s. 114 (Lands Clauses Act). Note the difference where, instead of a proviso for redemption, there is only a trust for sale upon nonpayment at a certain day, but the estate is redeemable before or after it. (Harding *v.* Tingey, 10 Jur. (N. S.) 872; 34 L. J. (Ch.) 13.)

488. The right of redemption, either under a mortgage or a pledge (*d*), cannot be altogether done away by the original contract, though it may be postponed by a covenant that during a certain time the estate shall remain irredeemable (656). Arrangements of this nature, postponing the remedies both of the mortgagor and the mortgagee, are of common occurrence, and are usually limited to periods of five or seven years, and they are supported on the ground that the contract is valuable to both parties; the mortgagee, on the one hand, being sure of a continuing security for his money, and the mortgagor being freed from the expense and trouble of seeking new lenders. A mortgagee is entitled to the benefit of such a covenant against a subsequent mortgagee, who took his security with notice of the covenant, and who will not be allowed during the stipulated period to redeem the prior mortgage (*e*). If he take without notice, the equity of redemption also still seems to be bound in his hands by the covenant of the mortgagor, who can give to another no better equity against the first mortgagee than he had himself. But where there was a proviso for redemption at a period more than thirty years distant from the date of the mortgage, and the estate, of which immediate possession had been taken by the mortgagee, had greatly increased in value, redemption was decreed (*f*) before the time fixed, as upon an unreasonable bargain; and where the mortgagee was the solicitor of the mortgagor, a restraint upon redemption for twenty years, with twelve months' notice after that time, was rejected as oppressive (*g*).

489. And Courts of Equity do not, except under peculiar circumstances, recognize agreements to confine the right of redemption to any given period, as the life of the mortgagor (*h*); or to any specified class of persons, as to the mortgagor alone, or the heirs of his body (*i*). In the one case, the right will be

(*d*) Story, Bailm. §§ 318, 345.

(*e*) Lawless *v.* Mansfield, 1 Dru. & War. 602.

(*f*) Talbot *v.* Braddyl, 1 Vern. 183, 394.

(*g*) Cowdry *v.* Day, 1 Gif. 316; 5 Jur. (N. S.) 1199.

(*h*) Newcomb *v.* Bonham, 1 Vern. 8; Spurgeon *v.* Collier, 1 Eden, 55. Contra as to the right to foreclose, see Burrowes *v.* Molloy, 2 Jo. & Lat. 521.

(*i*) Howard *v.* Harris, 1 Vern. 32.

opened to the extent allowed by the Statute of Limitations, and, in the other, it will be given to the persons in whom it might ordinarily become vested. In the case first cited it is laid down as a general rule by Lord Nottingham, "once a mortgage and always a mortgage;" and that the security could not be extinguished by any covenant or agreement at the time of making the contract (*k*). But a bill having been brought to reverse the former decree, Lord Keeper North said, "*modus et conventio vincunt legem*; all conditional purchases must not be turned into mortgages, and where there is a condition or covenant that is good and binding at law, equity will not take it away" (*l*). The rule, as explained by Lord Hardwicke, is (*m*), that an attempt to fetter the equity of redemption will not avail either by original agreement in the mortgage deed, or by a separate deed, where there is a design to wrest the estate fraudulently out of the hands of the mortgagor. And where the redemption was limited to the lifetime of the mortgagor, and it was shown that this was done by him by way of settlement with a wish to benefit the mortgagee, his near relation, and that the clause for redemption was put in for a particular reason; and there being also an express covenant that the mortgagor might redeem *at any time* during his life, which might have made it a bad bargain for the mortgagee, the deed was established (*n*).

490. Nor will an agreement be allowed at the time of the loan, not to sue for redemption or for the discharge of the equity of redemption upon any event or condition (*o*); nor a separate covenant that if the mortgagee shall think fit, the mortgagor will convey to him so much of the estate as shall be of the value of the mortgage money at so many years' purchase (*p*); nor even an agreement (*q*), which compelled the mortgagee to pay the residue of the purchase-money at a certain time; as where the mortgagee entered into a bond to

(*k*) 1 Vern. 8, and note.

(*l*) 1 Vern. 215; 2 Vent. 364; Howard *v.* Harris, id. 193.

(*m*) 2 Atk. 495.

(*n*) Bonham *v.* Newcomb, 1 Vern. 232; 2 Vent. 364; aff. in Parl. 2 W. & M.

(*o*) E. I. Company *v.* Atkyns, 1 Com. 349; Toomes *v.* Conset, 3 Atk. 261; Vernon *v.* Bethell, 2 Ed. 110.

(*p*) Jennings *v.* Ward, 2 Vern. 520.

(*q*) Willett *v.* Winnell, 1 Vern. 487.

pay the mortgagor a further sum, within a certain time after default in payment of principal and interest, in full for the absolute purchase of the estate: these being justly regarded as so many devices to evade the rules of the court.

491. The court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct; as where the mortgagee previously insisted on payment of principal and interest, and, concealing the covenant from the heir of the mortgagor, did not claim the right till after the sale of the estate to another person (*r*).

492. It has been said, that wherever there is a mortgage or a pledge of goods, the party may take his remedy in equity (*s*). It is not, however, a general rule that a person may come into equity for the redemption of personal chattels, for upon tender of the money an action at law may be brought for the chattels; but there may be a right to sue in equity, because it may be necessary to take an account of what is due on the security. As where the plaintiff is the assignee of the pledgor, and therefore a stranger to the amount due (*t*). So where A. pledged chattels personal with B., with an agreement for redemption in twelve months, but otherwise that the goods should be as bought and sold, and B. pledged the same chattels and other goods to C., to secure a larger sum, and borrowed other monies of C. on notes, and became bankrupt; a decree for redemption was made on A.'s bill against C. (*u*). And stock may be redeemed; but the privilege of redemption will be sparingly allowed if the bill appear to have been brought on account of an accidental increase in the value of the pledge (*x*).

And, on the other hand, if the proviso be that the stock shall be replaced according to a covenant on a certain day, which the mortgagee suffers to elapse, the terms of the security

(*r*) Orby *v.* Trigg, 2 Abr. Eq. Ca. 599; 9 Mod. 2.

(*s*) Ryal *v.* Roberts, Barn. Ch. 38.

(*t*) Ratcliff *v.* Davis, 1 Bulst. 29; Kemp *v.* Westbrook, 1 Ves. 278.

(*u*) Demainbray *v.* Metcalfe, 2 Vern. 690, 698.

(*x*) Lockwood *v.* Ewer, 2 Atk. 303.

in other respects remain as before; and though the value of the stock have fallen, the mortgagor will not be obliged to pay as the price of later redemption the market value of the stock at the original day, even though such damages might be recovered at law as damages for breach of the covenant (*y*).

Of the Statutes of Limitation.

493. It was enacted by 21 Jas. I. c. 16, ss. 1, 2, that all writs of formedon in *descender, remainder* and *reverter,* brought for any lands or hereditaments, should be sued within twenty years next after the title accrued, and that no person should make entry into such lands but within the like time. But if any person entitled to such writs, or having such right of entry, were at the time when it first accrued a minor, *feme covert, non compos mentis,* imprisoned, or beyond seas, the action might be brought or entry made within ten years after the disability had ceased. It has been said by a high authority (*z*), that this statute was meant to bind courts of equity; yet it is commonly thought to have been by analogy, rather than in direct obedience to the statute, that those courts, which had always exercised a discretion as to the hearing of stale demands, adopted the period thus fixed by the statute (*a*); and in suits for redemption held that the equity was barred after twenty years' possession by the mortgagee without acknowledgment; save in the case of the disabilities mentioned in the statute (which were also imported into the equitable rule (*b*)), and save in cases of fraud (*c*), or where the defendant submitted to be redeemed (*d*). And after the disability had ceased, the further period of ten years

(*y*) Blyth *v.* Carpenter, L. R., 2 Eq. 501; see M'Arthur *v.* Seaforth, 2 Taunt. 257; and as to bonds for restoration of specific sums of stock, see Forrest *v.* Elwes, 4 Ves. 492; Goddard *v.* Lethbridge, 16 Beav. 529.

(*z*) Per Lord Redesdale, 4 Bligh, 119.

(*a*) See Bac. Abr. Mortgage, E. 6, p. 718.

(*b*) Proctor *v.* Oates, 2 Atk. 140; Anon., 3 Atk. 313; Jenner *v.* Tracy, 3 P. W. 287, n.; Bonny *v.* Ridgard, cited 17 Ves. 99.

(*c*) Ord *v.* Smith, Sel. Ca. in Ch. 10; Proctor *v.* Cowper, 2 Vern. 377; Spurgeon *v.* Collier, 1 Ed. 55; Cotterell *v.* Purchase, For. 61. See Robertson *v.* Norris, 1 Gif. 421.

(*d*) Proctor *v.* Oates, 2 Atk. 140.

fixed by the statute for the prosecution of the suit was also observed in equity (*e*).

494. One ground upon which lapse of time was held to bar redemption, was said to be a presumption that the equity had been legally conveyed; which presumption was inapplicable where the equity was entailed, because (*f*) (at that time) the conveyance could be only after a recovery suffered by the tenant in tail.

495. The rights both of mortgagor and mortgagee have been limited by modern statutes.

By 3 & 4 Will. 4, c. 27, s. 28, it was enacted, that when a mortgagee shall have obtained possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession (*g*) or receipt, unless, in the meantime, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or person claiming the mortgagee's estate or interest, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons signing

(*e*) Belch *v.* Harvey, cited 3 P. W. 287, n.

(*f*) Cowne *v.* Douglas, M'Cl. & Younge, 321.

(*g*) As to the mode of averment of possession, see Lucas *v.* Dennison, 13 Sim. 584.

as aforesaid, and those claiming any part of the mortgage money or land or rent, by, from or under him or them, and persons entitled to any estate or interest to take effect after or in defeasance of his or their estate or interest; and shall not operate to give the mortgagor or mortgagors a right to redeem, as against the persons entitled to any other undivided or divided part of the money, land or rent. And where such of the mortgagees or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (*h*).

496. The statute applies to the case of a mortgagee in possession at the time of the passing of the act. So that where a mortgagee and his transferees had held possession for several years before the act, without any such acknowledgment as is required by the act, the equity was held to be barred when the twenty years' possession was complete; though before the passing of the act there had been acknowledgments, which, under the old law, would have saved the rights of the mortgagor (*i*).

497. So long as the mortgagor holds possession of any part of the estate, no lapse of time will bar his right; for as to the part of which he keeps possession his right remains. And, as he cannot (*k*) redeem that separately, he is allowed to redeem all. Yet an estate may become irredeemable as to

(*h*) In the Isle of Man, the estate "lapses" to the mortgagee after twenty-one years from the date of the mortgage, unless sooner redeemed, under the Act of Settlement passed there in 1703-4. (Christian *v.* Goldie, 2 Moore, P. C. 227.)

(*i*) Batchelor *v.* Middleton, 6 Hare, 75.

(*k*) Rakestraw *v.* Brewer, Sel. Ca. in Ch. 56; Burke *v.* Lynch, 2 Ba. & Be. 426. There seems no reason to doubt that the rule will apply under the statute.

part and redeemable as to the residue; as in a case mentioned by Lord Rosslyn (*l*), where the property went into different hands, and the owners of one part did acts amounting to acknowledgments of a mortgage title, but the other part became irredeemable.

498. Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day (*m*). But, it will be remembered, that Courts of Equity put a check upon transactions in which an unreasonable time or an improper condition has been fixed for redemption, and that in such cases they will decree redemption (*n*) before the arrival of the day fixed by the parties.

As to Welsh mortgages it is presumed, that time will not run under the statute against the mortgagor, until the mortgage has been fully satisfied; possession by the mortgagee being of the essence of the contract, and every receipt of rent being a receipt of interest under the mortgage. And it has always been held that such mortgages are redeemable after any length of time, until the mortgagee has been fully paid and has held over for twenty years (*o*) (**12, 1062**).

499. The statute of Will. 4 proceeds upon a principle which had been already recognized by the Court of Chancery as applicable to the limitation of the right of redemption, viz. that the antiquity of the defendant's possession is more to be regarded than the novel accruer of the plaintiff's title (*p*). So that the court made no exception to the rule against giving relief, after twenty years' possession by the mortgagee, during the ownership of the person entitled to the prior estate, and having a right to redeem, in favour of persons whose title did not accrue until after the lapse of the twenty years. If the person, for the time being entitled to redeem, neglected

(*l*) 3 Ves. jun. 22; and see Blake *v.* Foster, 2 Ba. & Be. 387.

(*m*) Brown *v.* Cole, 14 Sim. 427.

(*n*) Talbot *v.* Braddyl, 1 Vern. 183, 394; and see Ord *v.* Smith, Sel. Ca. in Ch. 10.

(*o*) Yates *v.* Hambly, 2 Atk. 360; Longuet *v.* Scawen, 1 Ves. 403; Fenwick *v.* Reed, 1 Mer. 114; Balfe *v.* Lord, 2 D. & W. 480. And see Alderson *v.* White, 2 De G. & J. 97.

(*p*) Ashton *v.* Milne, 6 Sim. 369; see Cholmondeley *v.* Clinton, 4 Bligh, 1.

his right, the neglect gave no new equity to his successor. Hence no benefit of the statute was given to the remainderman within twenty years from the death of the tenant for life, where the mortgagee entered during the tenant for life's estate and kept possession without acknowledgment during the full period (*q*). And so where, during the possession, there was a tenancy by the curtesy (*r*).

But the old rule still holds good (*s*), that the mortgagee's possession during the whole period must be adverse. Therefore if the mortgagee become entitled to an interest in the equity of redemption during his possession, as the interest of a tenant for life, the curtesy of a husband seised in right of his wife, or otherwise, he will lose the benefit of the statute, whether he acquire the interest during (*t*) or before taking (*u*) possession. And time will not run in his favour so long as the estate remains irredeemable; e. g., in the instances above mentioned against the remainderman or the heir of the wife, until the death of the tenant for life or of the husband.

So where the equity of redemption being vested in the husband and wife jointly, they conveyed by deed without fine to the mortgagee (whereby the deed being inoperative as to her estate, the mortgagee's ownership was absolute only in case the husband survived), and the wife eventually acquired the fee by survivorship, her heir was held entitled to redeem within twenty years from the husband's death (*v*). And the conveyance of the equity in such a case will have no greater force than it has by law; so that, although it may purport to be a conveyance of the fee by the husband and wife, this will not make the time run against her from the date of the deed (*x*).

So a sale under a decree obtained in 1733, by collusion

(*q*) Harrison *v.* Hollins, 1 Sim. & St. 471; Dallas *v.* Floyd, cited 6 Sim. 379; Cholmondeley *v.* Clinton, supra.

(*r*) Anon., 2 Atk. 333.

(*s*) Corbett *v.* Barker, 1 Anst. 138; 3 Id. 755; Reeve *v.* Hicks, 2 Sim. & St. 403; Raffety *v.* King, 1 Keen, 601 (disapproving of Ashton *v.* Milne, 6 Sim. 369); Hyde *v.* Dallaway, 2 Hare, 528.

(*t*) Hyde *v.* Dallaway, supra.

(*u*) Raffety *v.* King, 1 Keen, 601.

(*v*) Price *v.* Copner, 1 Sim. & St. 347. But it seems she should have had but ten years, for the right to redeem was first in her husband.

(*x*) Ravald *v.* Russell, Younge, 9.

between the tenant for life and others, to the prejudice of the remainderman, was set aside at the suit of the latter, brought sixty-three years afterwards, and within three months after his title accrued (*y*): and in another case (*z*), a decree for redemption was made at the suit of the remainderman thirty-five years after the collusive sale, the tenancy for life having lasted during the whole of that time. But it will be fatal to the remainderman's right to relief in such cases, if he have stood by and encouraged the defendants to believe themselves secure. And it should also be observed, that to give the remainderman a right to relief, the purchaser must be a party to, or at least have notice of, the fraud.

500. Possession is not the less adverse because it was taken by consent of the real owner, under a mistake on his part, where the person in possession has no duty to discharge towards the owner (*a*); but no act of an express trustee amounts to adverse possession (*b*). And it is provided by the statute of Will. 4 (*c*), that when any land or rent shall be vested in a trustee, upon any express trust, the right of the *cestui que trust*, or person claiming through him, to sue, shall be deemed to have first accrued at and not before the time at which the land or rent shall have been conveyed to a purchaser for valuable consideration, and then only as against such purchaser, and any person claiming through him. But in the case of a constructive trust, the trustee's possession may be adverse after a considerable lapse of time, even on a transaction arising out of fraud (*d*).

The purchaser of an equitable life estate has not an adverse possession against the trustee of the legal estate until the death of the tenant for life; because the trustee holds both for the tenant for life and the remainderman (*e*).

501. Before the passing of this statute, the right of redemption might be saved to the mortgagor, his representative

(*y*) Gore *v.* Stacpoole, 1 Dow, 18.

(*z*) Bandon *v.* Becher, 3 Cl. & Fin. 479.

(*a*) Cholmondeley *v.* Clinton, 4 Bligh, 1.

(*b*) Beckford *v.* Wade, 17 Ves. 87.

(*c*) 3 & 4 Will. 4, c. 27, s. 25.

(*d*) Beckford *v.* Wade, 17 Ves. 87; Collard *v.* Hare, 2 R. & M. 675.

(*e*) Fausset *v.* Carpenter, 2 Dow & Cl. 232.

or assignee, by any acknowledgment on the part of the mortgagee that he held by a mortgage title only, and which could be proved by clear and unequivocal parol or other evidence (*f*). Such an acknowledgment might be evidenced, not only by letters or express words or by conversations, but also by the acts of the mortgagee; as the keeping accounts (*g*) of the mortgaged property, if they were kept as mortgage accounts; for accounts kept by the mortgagee's agent as between himself and his principal, as landowner, though in a distinct book, were held not to be sufficient (*h*). So an assignment of the mortgage, though the mortgagor were no party, a devise of the mortgage, or a recital in a deed or will (*i*), were good acknowledgments; but not a conveyance of the estate, subject to such equity of redemption, *if any*, as persons named had in the same (*k*): nor was a mortgagee bound by an actual acknowledgment, given by his agent without his authority, as where the mortgagee from his state of mind was unable to authorize such an acknowledgment (*l*).

An agreement to purchase the equity of redemption (*m*), or a bill brought by the mortgagee to foreclose, was naturally an admission of a right to redeem; and in one case (*n*), where the mortgaged property had been demised for a term, determinable with the mortgagee's interest, and several bills of foreclosure had been filed during the plaintiff's infancy, redemption was decreed on a bill filed by him within two years after full age, though fifty-five years had elapsed from the date of the mortgage, and forty-seven years since the mortgagee was in possession.

502. The statute now requires that the acknowledgment be made in writing. But whatever expressions made by parol

(*f*) Whiting *v.* White, Coop. 1; Reeks *v.* Postlethwaite, Id. 161; Barron *v.* Martin, Id. 189.

(*g*) Anon., 2 Atk. 333; case cited, 3 Ves. 22; Cutler *v.* Cremer, 1 L. J., Ch. 108.

(*h*) Barron *v.* Martin, Coop. 189.

(*i*) Case cited, 3 Ves. jun. 22; Smart *v.* Hunt, 4 Ves. 478, n.; Perry *v.* Marston, 2 Bro. C. C. 399; Hansard *v.* Hardy, 18 Ves. 455; Anon., 3 Atk. 313; Price *v.* Copner, 1 S. & S. 347. See Carew *v.* Johnston, 2 Sch. & Lef. 295.

(*k*) Hardy *v.* Reeves, 4 Ves. 466.

(*l*) Barron *v.* Martin, Coop. 189.

(*m*) Conway *v.* Shrimpton, 5 Bro. P. C. 187.

(*n*) Palmer *v.* Jackson, 5 Bro. P. C. 281.

would have amounted before the statute to an acknowledgment, will still be sufficient if in writing, and if the other requirements of the statute be duly satisfied (*o*). Any expression, therefore, referring to the estate as mortgaged, or to the alleged owner of the equity of redemption, and expressing a readiness to settle the account, or referring to a proposed arrangement for accounting or for paying off the mortgage debt, will still be a sufficient acknowledgment. No particular form is necessary, and the amount alleged to be due need not be stated (*p*); and the acknowledgment may be made as well by answer or affidavit in a suit, or in a schedule to a deed, or in the Insolvent Court (*q*), or by an answer in Chancery (*r*), as by a letter or other writing. But a mere admission by the mortgagee that he holds under a mortgage title, if coupled with a denial of the right claimed, is not sufficient (*s*). No admission will be inferred from equivocal expressions, and it seems that stronger words will be necessary to revive the equity of redemption, after the twenty years have passed, than to support an admission of right which at the time was clearly vested in the mortgagor (*t*).

The question has been raised, but was not decided (*u*), whether the circumstances that the mortgagee during his possession had accounted and treated himself as a mortgagee, would amount to an acknowledgment within the act. But it seems clear that those acts would not be sufficient, unless the accounts or other admissions were written, signed, and delivered, according to the directions of the act.

The filing of a bill for foreclosure, however strong an acknowledgment irrespective of the statute, does not appear to fall within its plain words, to which the courts have shown themselves disposed in several cases to adhere. No force is

(*o*) Stansfield *v.* Hobson, 16 Beav. 236.

(*p*) Trulock *v.* Robey, 12 Sim. 402; Stansfield *v.* Hobson, 16 Beav. 236, and 3 De G., M. & G. 620; Hodle *v.* Healy, 6 Mad. 181; Lord St. John *v.* Boughton, 9 Sim. 219; and see Prance *v.* Sympson, Kay, 678.

(*q*) Blair *v.* Nugent, 3 Jo. & L. 658, 677; Sugd. R. P. S. 130.

(*r*) Goode *v.* Job, 1 E. & E. 6; 5 Jur. (N. S.) 145.

(*s*) Thompson *v.* Bowyer, 9 Jur. (N. S.) 863.

(*t*) Whiting *v.* White, Coop. 1; 2 Cox, 290; Reeks *v.* Postlethwaite, Coop. 161; Barron *v.* Martin, Id. 189.

(*u*) Baker *v.* Wetton, 14 Sim. 426.

given under this section (28) to an acknowledgment signed by the mortgagee's agent (**770, 1673**), and this was probably intentional, that the acknowledgment might be the more certain. Now it was determined (*x*) under another statute (*y*), which required a writing signed by the party chargeable, that none could be given effectually by an agent; and if it were shown under this act that the bill was filed by the written instruction of the mortgagee to his solicitor, the bill is still the act and bears the signature of an agent; and the written instruction to him is not a good acknowledgment (*z*).

503. The admission must be made to the mortgagor himself (*a*), or to those who claim his estate, or the agent of one of such persons. Therefore a transfer of mortgage to which the mortgagor, or the claimant under him, is not a party, will not be an acknowledgment (*b*), and the transferee cannot be considered as a claimant of the mortgagor's estate, but of the mortgagee's.

No actual authority is necessary to constitute an agent of the person to whom the acknowledgment is made. It is sufficient if it be made to a person acting, or treated by the maker, as an agent. Therefore (*c*) a written acknowledgment by the mortgagee, to a person acting for the infant heir of the mortgagor, has been held to save the right of the latter from the date of the admission. But a letter by the mortgagee to his own solicitor will not take away the benefit of the statute (*d*).

504. The acknowledgment need not have been given within twenty years after the mortgagee took possession; an acknowledgment after the lapse of that time being sufficient, both before and since the passing of the act of Will. 4, to revive the right of redemption (*e*). If the mortgagee have settled the estate, the acknowledgment of the tenant in tail will

(*x*) Hyde *v.* Johnson, 2 Bing. N. C. 776.

(*y*) 9 Geo. 4, c. 14, s. 1.

(*z*) See Stansfield *v.* Hobson, 16 Beav. 236; 3 De G., M. & G. 620.

(*a*) Sect. 28.

(*b*) Batchelor *v.* Middleton, 6 Hare, 75; Lucas *v.* Dennison, 13 Sim. 584.

(*c*) Trulock *v.* Robey, 12 Sim. 402.

(*d*) Stansfield *v.* Hobson, 16 Beav. 236.

(*e*) Stansfield *v.* Hobson, 3 De G., M. & G. 620.

revive the right, and a title acquired by him from the owners of the equity of redemption will prevail against the estate created by the settlement (*f*): and the mortgagee's acknowledgment will bind his lessee, though no party to it (*g*).

505. The effect of the statute is not prevented by a mere demand by one party, without process against or acknowledgment by the other (*h*). But the filing of a bill to enforce the demand will save the right against the statute, though no further proceeding be taken, or service effected; for it may happen that process cannot be served until long after the filing of the bill. The plaintiff by misconduct or delay may, however, disentitle himself to the benefit of this rule (*i*). And, in practice, it seems that since the statute 4 & 5 Will. 4, c. 82, by which substituted service may be had, the plaintiff cannot so often have a good excuse for delaying to follow up the filing of his bill by the usual process. It seems, too, that the operation of the statute will not be affected, if it can be inferred that the suit which has been commenced has failed (*k*), or if it have been practically abandoned, although not actually dismissed as to all the defendants (*l*).

506. It has been observed (*m*), that there is no saving (by sect. 16) for disabilities of the mortgagor, or his heirs, in regard to the bar created by sect. 28; and if the position of the clauses be alone considered, there seems to be good reason for this conclusion; but whether it was intended, and whether Courts of Equity in construing the act would feel bound to deprive the mortgagor and his heirs of this benefit, may be doubted. The only reason why they should be deprived of the advantage, which it is clear they enjoyed when their rights were governed by analogy to the old Statute of Limitations, seems to be, that by the present statute the right to

(*f*) Pendleton *v.* Rooth, 1 Gif. 35; 1 De G., F. & J. 81; 5 Jur., N. S. 840; 6 id. 182.

(*g*) Ball *v.* Lord Riversdale, Beat. 550.

(*h*) Hodle *v.* Healy, 1 Ves. & B. 536.

(*i*) Coppin *v.* Gray, 1 Y. & C. C. C. 205; Forster *v.* Thompson, 4 Dru. & War. 303; Boyd *v.* Higginson, Flan. & K. 603; and see 3 Dru. & War. 123; Hele *v.* Lord Bexley, 20 Beav. 127.

(*k*) Bampton *v.* Birchall, 5 Beav. 67.

(*l*) Dixon *v.* Gayfere, 17 Beav. 421.

(*m*) Sudg. R. P. S. 114.

redeem is limited by a distinct and separate clause; whilst the remedies of mortgagees are affected only in common with the remedies of other persons, who claim "any land or rent in equity" (*n*), and to whose rights the disability clause is generally applicable. But for this there were several reasons. The time of accruer of the right to sue, the nature of the acknowledgment, the persons in whose favour, and against whom, the acknowledgment is to operate, the part of the estate which may be redeemed in certain cases, and the proportion of the mortgage debt and interest necessary to be paid on such redemption, are all matters for which, as they affect the rights of the mortgagor, it was necessary, or was thought fit, to make special provisions, which were most conveniently combined in a separate clause. But this does not alter the fact that a redemption suit is a suit to recover "land or rent in equity." To such suits the disability clause, as well as those which relate to cases of express trusts (*o*), and of fraud (*p*), are generally applicable; and it would be a singular and narrow construction of the act to bind a mortgagor under disability now, who was not so bound before the present statute, because it was found necessary to give a larger explanation of his other rights. The extension of the 16th to the 28th section appears by no means so strong a conclusion as the extension of the 25th (express trusts) to the 40th and 42nd (**689**); for, in the former case, both sections refer, in effect, to suits for the recovery of lands, but, in the latter, one contemplates the recovery of land, and the other money and the interest of money charged on land.

507. Neither the former nor the present Statutes of Limitation affect the right to redeem goods which are merely pledged; for where no period is fixed it is said that the pledgor may redeem them at any time during his life, except during his outlawry (*q*), the death of the pledgee not affecting the right; but none being allowed after the death of the pledgor (*r*), because it is a personal condition as to him.

(*n*) Sect. 24.
(*o*) Sect. 25.
(*p*) Sect. 26.
(*q*) Per Williams, J., 1 Bulst. 29.
(*r*) Ratcliff *v.* Davis, 1 Bulst. 29; Yelv. 178; Kemp *v.* Westbrook, 1 Ves. 278.

508. Persons who omit to set up the Statute of Limitations in the pleadings can have no protection from it (*s*). It may be used as a defence, either by the answer (*t*), by plea (*u*), or where it appears on the face of the bill that the cause of suit accrued the full number of limited years before the filing of the bill—as, for instance, in a redemption suit, that the mortgagee had been in possession for twenty years, without treating the estate as a security,—by demurrer (*x*). And in the case of a claim, the defence will of course be brought forward at the hearing (*y*).

509. To make a demurrer tenable, it must appear on the face of the bill, by dates positively stated, that the defendant has been in possession upwards of twenty years before the filing of the bill (*z*). Nothing must be left to be worked out by the inference of the court, or by the arguments of the counsel. Thus a statement in a bill that the defendant took possession *soon after* a certain period, and has held the estate ever since, will not support a demurrer; for the court will not judge what is the meaning of "soon after," and a demurrer, founded on such a statement, will be an argumentative or speaking demurrer, because it must set forth, that possession was taken at or about the time stated, *which is* upwards of twenty years, &c.

Moreover, if there be no certainty as to the commencement of the possession, it will not be presumed (*a*), in favour of a demurrer, that the commencement was within such a time from the date, as to make a possession of twenty years by the mortgagee. And a bill for redemption is not demurrable only

(*s*) Fordham *v.* Wallis, 10 Hare, 231; 17 Jur. 228; Holding *v.* Barton, 1 S. & G. xxv.

(*t*) Aggas *v.* Pickerell, 3 Atk. 225; Batchelor *v.* Middleton, 6 Hare, 75; Adams *v.* Barry, 2 Coll. 285.

(*u*) Pearson *v.* Pulley, 1 Ch. Ca. 102; Clapham *v.* Boyer, Ch. R. 110; Aggas *v.* Pickerell, 3 Atk. 225; Blewitt *v.* Thomas, 2 Ves. jun. 669; Lucas *v.* Dennison, 13 Sim. 584.

(*x*) Jenner *v.* Tracy, 3 P. Wms. 287, n.; Edsell *v.* Buchanan, 2 Ves. jun. 83; 4 Bro. C. C. 254; Hardy *v.* Reeves, 4 Ves. 466; Hodle *v.* Healy, 1 Ves. & B. 536; Beckford *v.* Close, cited 3 Bro. C. C. 644; Foster *v.* Hodgson, 19 Ves. 179; Hoare *v.* Peck, 6 Sim. 51; Prance *v.* Sympson, Kay, 678; Baker *v.* Wetton, 14 Sim. 426; and see 3 Y. & C. 275, note.

(*y*) Stansfield *v.* Hobson, 16 Beav. 236.

(*z*) Edsell *v.* Buchanan, 2 Ves. jun. 82; 4 Bro. C. C. 254.

(*a*) Baker *v.* Wetton, 14 Sim. 426.

by reason of a statement that the mortgagee had been in possession without acknowledgment of a mortgage title; it must plainly appear that the possession lasted for twenty years (*b*).

It will be sufficient if the defendant claim the benefit of the "Statute" of Limitations, that expression being equivalent to a claim of the benefit of the statute law of limitations, and therefore of any of the statutes which may meet the defendant's case (*c*).

Of the Persons entitled to redeem.

510. The estate in mortgage may be redeemed, not only by the persons specified in the proviso for redemption and their representatives, but also by all persons who have any interest in or lien upon the estate. The reconveyance will be made to the person redeeming or his assigns, or to the persons or uses mentioned in the proviso, or to which the estate was limited at the time of the mortgage. It is often a question of difficulty in which of these latter modes the reconveyance is to be made. In equitable mortgages by deposit indeed, and in other transactions of the nature of securities, but in which there is no express stipulation for redemption, this question can hardly arise by reason of any uncertainty connected with the security; but in mortgages of a formal kind, it sometimes happens that the reconveyance is directed to be made to persons or uses different from those, to whom or to which it originally belonged, or was subject; and in the absence of express declaration it may be doubtful, whether the variation arose by accident or intention.

511. Before stating the principles upon which questions of this kind are decided, it may be observed, that with respect to mortgages by tenants in tail, the question of intention, where the limitations are varied, is no longer important, the disposition by way of mortgage, or for any other limited purpose of the tenant in tail, being by statute (*d*) an absolute

(*b*) Green *v.* Nicholls, 4 L. J., Ch. 118.

(*c*) Adams *v.* Barry, 2 Coll. 285.

(*d*) Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 21.

bar, both at law and in equity, to all persons as against whom such disposition may be made under the same statute, notwithstanding any intention, express or implied, to the contrary, by the deed containing the disposition, except where the disposition is only of an estate *pur autre vie* or for years, absolute or determinable, or where an interest, charge, lien or incumbrance shall be created without an absolute or determinable term or other greater estate for securing the same; in which cases the disposition is, in equity only, a bar, so far as may be necessary to give effect to the mortgage or other limited purpose, interest, charge, lien or incumbrance, notwithstanding any intention, expressed or implied, to the contrary in the deed of disposition: so that where an estate, greater than an estate *pur autre vie*, is disposed of by a tenant in tail, the entail is barred, although the intention of creating a limited disposition only be expressly declared by the deed; but where the estate is only *pur autre vie*, or for one of the yet smaller interests mentioned in the latter part of the section, the estate tail will be only barred *pro tanto:* and thus, as has been observed (*e*), the statute denies effect to the express intention of confining the operation of the deed in one case, and to the express intention of extending it in another. The statute does not, however, it is added, affect an express limitation of the old or any other uses which the tenant in tail may choose to create by the same deed.

512. The first principle by which Courts of Equity are guided, in questions arising out of a variation of the right of redemption, is, that a mortgage, being nothing more than a transaction for raising a loan, there is a presumption against an intention to alter the previous rights of the parties, further than is necessary to effect that object. The mere reservation, therefore, of the equity of redemption, in a manner different from the former ownership of the estate, whether it be made expressly or by a declaration (where the mortgage is made in exercise of a power of appointment) (*f*), that the appointment shall be void on payment of the money, is considered (fraud not being in question) to arise from inaccuracy or

(*e*) Sugd. R. P. Stat. 199. (*f*) Fitzgerald *v.* Fauconbridge, Fitzgib. 207.

mistake, which may be explained and corrected by reference to the state of the title as it stood before the mortgage. Hence, if on a mortgage in fee by a mortgagor so seised (*g*), the redemption be reserved to him, and the heirs of his body, it will still *primâ facie* follow the former title; and if husband and wife mortgage the wife's land (*h*), the equity of redemption will be the wife's, although, by the deed, it be reserved to the husband and his heirs, and though he have kept down the interest. And if the estate have been reconveyed to the husband, his heir will be decreed to convey to the widow (*i*).

To change the ownership, therefore, the court must be satisfied that there was a purpose to do so, beyond the immediate object of the mortgage, and will not generally take the words of the deed as primâ facie evidence of such a purpose, though it requires no express declaration of intention (*k*). There must in fact be circumstances to repel the presumption that the parties meant only to make a security, and the circumstances must be stronger, when, as it often happens, the parties stand in the relation of husband and wife, and the wife has released an interest in the husband's estate, or has burthened her own for his benefit.

513. In considering the extent of the rule in question, it must be observed that, though apparently plain, it contains in itself the elements of discord; because circumstances or expressions which to one mind afford conclusive evidence of a change of intention, are to another merely the result of a want of thought in the parties concerned, or of skill in the person instructed to carry out their intentions.

514. It is clear that where there is but one mortgage of an estate under settlement with regular limitations, a simple reservation of the equity of redemption not according to the former ownership, as, for instance, to the mortgagor in fee, or

(*g*) Innes *v.* Jackson, 16 Ves. 367; and see per Turner, L. J., 3 De G., M. & G. 15.

(*h*) Brend *v.* Brend, 1 Vern. 213; Ruscombe *v.* Hare, 2 Bligh, N. R. 192.

(*i*) Stansfield *v.* Hallam, 5 Jur., N. S. 1334; 29 L. J., Ch., N. S. 173.

(*k*) Jackson *v.* Innes, 1 Bligh, 104; Lord Hastings *v.* Astley, 30 Beav. 260.

to him and wife and their heirs, will not overturn the original limitations, but the equity of redemption will still remain subject to them. But it is the opinion of a very eminent writer, that in the converse case, viz. that of an original ownership in fee, and a settlement of the equity of redemption by limitations, the rule should not prevail; and it is evident, that whilst in the one case the variation may easily arise from the oversight or ignorance of the draughtsmen, in the other, the nature of the reservation almost excludes a presumption of its having been made unintentionally. Hence it has, with reason, been contended, that in a case in which the wife's reversion in fee was mortgaged by her and her husband, and the equity of redemption reserved to such uses as they should appoint by deed, executed with prescribed formalities, and, in default of appointment, to the wife in fee; a doubt as to the effect of this limitation was misplaced (*l*).

The presence, where the mortgage itself affects the fee, of a distinct declaration and limitation of the ownership of the estate after satisfaction of the debt, has been held (*m*) sufficient to show that something beyond a mere security was in contemplation.

515. In the leading case (*n*), by which the doctrine under consideration was recognized and explained, it was considered to be important evidence of an intention to revoke the former uses, that the mortgage was for a term only, and that the declaration of the new uses extended to the fee, so that the two estates were quite distinct; the term being at an end upon repayment of the debt, whilst the uses remained to be affected by the re-settlement. And in a much earlier case (*o*) of a mortgage for a term of the wife's lands (subject to which the inheritance was settled upon her for life, with remainder over in tail), the term was held to result for the benefit of the remainderman, although the husband had taken an assignment

(*l*) Martin *v.* Mitchell, 2 Jac. & W. 413; Sugd. Pow. 1—352, ed. 7.

(*m*) Rowell *v.* Whalley, 1 Ch. Rep. 116. And see Parker *v.* Hills, Hills *v.* Parker, 5 Jur., N. S. 809; 7 id. 833, where the security formed part of complicated partnership arrangements.

(*n*) Innes *v.* Jackson, 16 Ves. 356; Jackson *v.* Innes, 1 Bligh, 104.

(*o*) Huntingdon *v.* Huntingdon, 2 Vern. 437; 1 Bro. P. C. 1.

of it in trust for himself under a proviso in an assignment of the mortgage, and had bequeathed it by his will.

The interest of the person claiming against the mortgage deed has been also considered; and a distinction has been taken between cases where the wife or other person joins in a mortgage for the mere purpose of giving validity to it, and where the security is effected by means of an absolute power over the estate, the exercise of which leaves no equity against the mortgagor in any other person; as, for instance, where the claimant (*p*) against the new limitation of the equity of redemption derived his title from a remainderman whose estate was always liable to be, and was in fact, held to be defeated by the exercise of the power; and who had not joined in the mortgage, and had no other equity.

The decision by which this last distinction was established has been severely criticised (*q*) by Lord St. Leonards. It has, however, been considered by a learned and careful judge to be good law (*r*), and it may be doubted if the arguments against it are sufficient to overturn its validity. In the case in question the mortgagor had by a recovery deed limited the estate (of which, prior to the recovery, he was tenant in tail) to such uses as he should appoint, by deed or will, and in default of appointment to the uses of the will of a former owner. He then mortgaged and provided for a reconveyance to the subsisting uses; but in a subsequent transaction the mortgage was transferred by a deed, admitted to be inaccurately framed, and the reconveyance was then directed to be made to the mortgagor, his heirs or assigns, or to such person or persons as he or they should for that purpose appoint. It was held that the ownership was changed.

The objections of Lord St. Leonards to this decision are, in effect, that the deeds, informally drawn, were executed, not because the mortgagor had changed his intention, but because the mortgagee required his money (*s*); and that the proviso

(*p*) Anson *v.* Lee, 4 Sim. 364.

(*q*) Treatise on Powers, i. 345, 7th ed.

(*r*) Whitbread *v.* Smith, 17 Jur. 725; 1 Dr. 531. See, however, Walker *v.* Armstrong, 25 L. J., Ch., N. S. 406.

(*s*) It was recited that he required his money; but this is so common a recital in transfers of mortgages, that it affords no clue to the real objects of the transaction.

was only an informal declaration of his intention to retain a power over the estate subject to the mortgage. The *intention*, he observes, must govern, and none was declared to defeat the former limitations; and to argue that, because the limitation in the deed is to the party in fee, therefore it must be held to express the intention, is to deny the rule. The last observation is no doubt abstractedly correct; but the correctness of its application may be doubted, because the decision does not appear to have been founded upon any such argument. The Vice-Chancellor (Shadwell) said, "I must suppose, that that which is expressed in the deed, was what was intended by the parties to it, *unless there is something in the character of the parties that necessarily rebuts that presumption.*" These expressions are certainly open to criticism, because, as we have seen, the presumption is, not that the words of the deed express the intention, but that, notwithstanding the words of the deed, the ownership of the estate is to remain the same: but, the last words of the sentence, and indeed the whole judgment, show that the Vice-Chancellor had no intention whatever of denying the rule, but that he thought the case was taken out of it by circumstances. And with respect to the other objections, it is not a necessary consequence, that because the alteration was made in a deed relating to the mortgage, the mortgagor had no intention to alter the ownership. Why may he not have changed his intention, and have taken the opportunity of carrying out the change upon the occasion of this transfer, in order to avoid the necessity of a distinct deed? It is clear that intention may be inferred from the whole transaction, and that no express declaration of it is necessary (*t*). It seems therefore too much to argue, from the absence of express declaration, that no intention existed. There was in this case a prior mortgage deed from which the language of the later deed varied; the mortgagor possessed an absolute power over the estate, the exercise of which gave no equity against him to anybody, and he might, if he had chosen to do so, have given himself the fee simple absolutely by the recovery deed.

(*t*) Jackson *v.* Innes, supra.

516. The case of *Anson* v. *Lee* is also indirectly supported by the old case of *Fitzgerald* v. *Fauconbridge* (*u*), on the authority of which another distinction has been established, where the security is not by way of mortgage, but takes the form of a trust to raise money, and subject thereto for the maker of the security. In *Fitzgerald* v. *Fauconbridge*, in which such a deed, executed under a power of revocation, was held to supersede the limitations of a prior settlement made by the then owner of the estate, the distinction from the case of a mortgage, as a mere security for money, was strongly insisted on both by Reynolds, C.B., and by Lord King, and their decision in favour of an altered ownership was followed (*x*), where the lands of the wife, settled upon the husband, wife and children, subject to a joint power of appointment in the husband and wife, were, by the exercise of that power, appointed to the use of such trustees as the husband alone should appoint, and subject thereto upon trust for the husband and wife, and then for the children as before. The husband executed a security in which the trustees concurred, and appointed that they should hold the land upon trust for sale and to secure the repayment of the mortgage money, and subject thereto upon trust for him and his heirs. The concurrence of the trustees was much relied upon in support of the view that the property was altered, as the trustees would otherwise have committed, and been responsible for, a breach of trust.

It is however to be noted, that in *Fitzgerald* v. *Fauconbridge*, the estate was originally the fee simple estate of the husband, but in *Heather* v. *O'Neill* of the wife, though by an intermediate settlement the full power over it was given to the husband. It was only on the deed by which the husband executed this power that the decision in the Court of Appeal was founded; but, considering all the circumstances, it seems open to some doubt whether just weight was attached to this former ownership of the wife; according to the remark of Shadwell, V.C.E. (*y*), that where the husband and wife are dealing with the wife's estate, there is something in the

(*u*) Fitzgib. 207.

(*x*) Heather *v.* O'Neill, 2 De G. & J. 399; 4 Jur., N. S. 131, 957.

(*y*) 4 Sim. 379.

character of the parties to the deed which rebuts the presumption that the equity of redemption was intended to go to the husband's heirs.

517. Another distinction which has been taken is,—that where there have been several mortgages, and by one or more of the prior ones, the equity of redemption has been reserved according to the former ownership, but has been otherwise limited by subsequent deeds, the later dispositions are held to show a deliberate intention to alter the uses. Accordingly, where the mortgages contained trusts for sale, and by the first deed the residue of the purchase-monies, and the unsold parts of the estates (which were in settlement), were directed to be held upon the trusts of the settlement, and the proviso for re-conveyance was to a similar effect; but under the other mortgages, the surplus monies were to be paid, and the re-conveyances to be made to the mortgagor absolutely; this difference of language was expressly mentioned (*z*) as a reason for holding that the ownership was changed. And where (*a*) in several prior mortgages the limitations of the settlement (being limitations to such uses as a husband and wife should appoint, and in default to them successively for life, with remainder to the eldest son in fee) were distinctly referred to or repeated, and by a subsequent security the re-conveyance was directed to be made to the use of the husband and wife, their heirs and assigns, or as they should direct, and the residue of the purchase-money was similarly disposed of, the limitations were at first held to be changed by the latter deed, there being, in addition to the variation of language, these circumstances in favour of the decision,—viz. that, by a contemporary deed, outstanding terms were assigned to attend the inheritance according to the uses and estates limited by the last deed of mortgage, which deed had also the effect of giving to the wife a greater interest in the estate than she would have had under the settlement. This decision was reversed by the full Court of Appeal (*b*). Yet in the absence of a

(*z*) Barnett *v.* Wilson, 2 Y. & C. C. C. 407.

(*a*) Whitbread *v.* Smith, 17 Jur. 725; 1 Dr. 531.

(*b*) 18 Jur. 475; 3 De G., M. & G. 727.

judicial declaration made upon the reversal, that the case as reversed was perfectly consistent with that of *Barnett* v. *Wilson*, it might have been difficult to discover any solid reason why the limitations should have been changed in that case, and not in *Whitbread* v. *Smith*.

518. Where the estate mortgaged was the husband's (*c*), and the wife joined to bar dower, and the equity of redemption was limited both in the first and in subsequent securities to the husband and wife and their heirs, and the mortgage contained a declaration that, after payment of the debt, the fine levied should enure to the husband and his heirs, the proviso for redemption was held not to operate against the husband's ownership, beyond the wife's right to redeem in respect of her dower.

519. As against a wife joining in the deed to enable the husband to mortgage his estate charged for her benefit (*d*), or joining in mortgaging her chattel leaseholds (*e*), the re-assignment being directed to be made to the husband or to him and the wife jointly, no change will, without further expression of intention, be held to have been made. But where the wife's estate was mortgaged under circumstances which showed a plain intention to create further charges, (the surrender being to uses in favour of the husband, and subject to such powers of sale, and charged with such sums as the mortgagee, at the request of the husband, should appoint, and in default to the use of the mortgagee, subject to redemption by the husband); it was held, that the change of the limitations was clearly effectual against the wife, with respect to further advances made under the deed; independently, it seems, of evidence, that the wife was an active party in the raising of the further advances (*f*).

520. In a case between father and son (*g*), where the former being tenant for life, with remainder as he and his son should appoint, with remainder to the son in fee, joined with

(*c*) Jackson *v.* Parker, Ambler, 687.
(*d*) Wood *v.* Wood, 7 Beav. 183.
(*e*) Clark *v.* Burgh, 2 Coll. 221.
(*f*) Eddleston *v.* Collins, 3 De G., M. & G. 1, 15; 17 Jur. 331.
(*g*) Hipkin *v.* Wilson, 3 De G. & S. 738; 14 Jur. 1126.

the son in a mortgage in fee, with proviso for reconveyance to the father and son, their heirs or assigns, or as they should direct, and a declaration that the father should keep down the interest during his life; the latter clause was held to mark an intention that the original ownership should not be changed.

521. Upon the principles laid down in the cases of *Ruscombe* v. *Hare* and *Jackson* v. *Innes*, it has also been held (*h*), that where a testator, seised of an equity of redemption to uses to bar dower, devised the estate prior to the 1 Vict. c. 26, and afterwards took a reconveyance to similar uses, the reconveyance did not operate as a revocation of the devise.

522. A mortgage by husband and wife, of an estate of which they are seised in fee by entireties, with a proviso for redemption and reconveyance to them and their heirs, or appointees, enables the wife to concur with the husband in making, on reconveyance, a settlement without fine, altering the former uses, and which will be effectual against a subsequent conveyance by the husband for value after her death (*i*).

Of the Wife's and Surety's Rights to redeem.

523. The equity of redemption of the wife's real estate remains with her in ordinary cases as part of the inheritance. With respect to her chattel leaseholds, if the husband and wife join in the mortgage, or if he mortgage the term, and the redemption be reserved to the husband and wife, the equity will belong to them both (*k*). And if the husband become insolvent, the right of redemption will be given to the assignees and the wife (*l*). If they both mortgage, and the husband survive, the redemption will belong to him; for he had full power to alien by the marriage, and upon surviving he shall enjoy against the representatives of his wife (*m*). But if the wife survive, the right of redemption will remain with her (*n*): the mortgage being no alienation, except to the extent of the

(*h*) Plowden *v.* Hyde, 2 Sim. N. S. 171; 16 Jur. 512, 823; 2 De G., M. & G. 684.

(*i*) Atkinson *v.* Smith, 3 De G. & J. 186; 4 Jur., N. S. 1160, 963.

(*k*) Preston on Abstracts, 1, 345.

(*l*) Hill *v.* Edmonds, 5 De G. & S. 603; 16 Jur. 1133.

(*m*) Yong *v.* Radford, Hobart, 3.

(*n*) Powell, Mort. 714.

money borrowed, The wife will not, however, become thus entitled to redeem (*o*), against her husband's creditors, leaseholds settled by the husband after the marriage, and subsequently mortgaged by him and made redeemable by the husband and wife or either of them, their or either of their executors or administrators, with a proviso for quiet enjoyment by the husband; this being a voluntary settlement and it being always in the husband's power to alien.

If the husband join in transferring his wife's mortgage of leasehold, and afterwards reduce the debt by payments in his lifetime, and leave the wife surviving, she may redeem, but upon the condition (*p*) that his estate shall be in the place of the mortgagee as to the sums paid by the husband; even though in the transfer the husband covenanted to pay the debt.

If the wife's equity of redemption of leasehold be settled in trust for herself before marriage with the husband's privity, and the lease come to his hands as assignee of the wife's mortgagee, and he surrender and take a new lease, the wife or her trustees may still redeem it (*q*); because he took the old lease, subject to the same equities under which it was held by the mortgagee: but it would have been otherwise if the settlement had been made secretly without the husband's privity.

524. A surety is entitled to redeem the estate (*r*) charged, by virtue of his right to avail himself of all the creditors' securities (*s*) (**1461**); but not where the suretyship is for another debt, or for a distinct part of the same debt, for which the first security is given. Therefore, if a surety by bond for part of a debt, the other part whereof is secured in another transaction by a mortgage, be compelled to pay on his bond, he is not entitled against a subsequent mortgagee of the same estate to the benefit of redemption of the mortgage, in satisfaction of what he has paid on the bond (*t*).

(*o*) Watts *v.* Thomas, 2 P. W. 364.

(*p*) Pitt *v.* Pitt, Turn. & R. 180.

(*q*) Draper's case, 2 Freem. 29, 30; 2 Eq. Ca. Abr. 130.

(*r*) Wade *v.* Coope, 2 Sim. 155.

(*s*) See Ex parte Crisp, 1 Atk. 608; Wright *v.* Morley, 11 Ves. 12; Mayhew *v.* Crickett, 2 Sw. 185; Copis *v.* Middleton, T. & R. 224.

(*t*) Wade *v.* Coope, supra.

A married woman, whose estate has been mortgaged for the benefit of the husband, stands in the position of a surety (*u*), and she may therefore redeem (**1325**).

525. The wife ought to sue by her next friend for the redemption of a mortgage of her estate made by her and her husband; but even when he has become bankrupt he retains sufficient interest to sue as a co-plaintiff (*x*).

The Right of Joint Tenants, &c.

526. If the equity of redemption be the property of several persons as joint tenants (*y*) or tenants in common (*z*), one of them may redeem; each as against an incumbrancer, and subject to account with his co-tenant, being entitled to possession and receipt of the whole of the rents.

But it seems that one cannot redeem his own moiety only; for this would be directly contrary to the principle that a mortgage is to be redeemed entirely or not at all (**1016, 1239**). A case is on record (*a*), in which one joint tenant is said to have been allowed to redeem his moiety alone; but this is supposed by Mr. Coventry (*b*), to have been decreed by consent.

Tenants in common of an equity of redemption cannot in a suit for redemption insist upon a partition against the consent of the mortgagee; partition being a kind of relief not incident to redemption or foreclosure suits (*c*).

527. If a trust estate be properly mortgaged for the purposes of the trust, the equity of redemption alone remains affected by the trust; the mortgagee, though he be one of the trustees, has the ordinary mortgagee's rights, and the only relief which belongs to the trustees is redemption upon the usual terms (*d*).

(*u*) Earl of Kinnoul *v.* Money, 3 Sw. 202, n.; and decree, 220, n.; Hudson *v.* Carmichael, Kay, 613.

(*x*) Smith *v.* Etches, 1 H. & M. 558; 9 Jur., N. S. 1228, and see 10 id. 124.

(*y*) Waugh *v.* Land, G. Coop. 130.

(*z*) Wynne *v.* Styan, 2 Ph. 306. As to the rights of the mortgagee of a tenant in common against his co-tenants, see Bentley *v.* Bates, 4 Y. & C. 182.

(*a*) Waugh *v.* Land, supra.

(*b*) Pow. Mort. 342 a, note.

(*c*) Watkins *v.* Williams, 3 Mac. & G. 622; 16 Jur. 181.

(*d*) Attorney-General *v.* Hardy, 1 Sim., N. S. 338.

The Rights of Tenants in Tail and for Life, and Remaindermen.

528. The tenant in tail of the equity of redemption may also redeem (*e*), and so may the tenant for life (*f*), though his estate be only equitable (*g*), and whether the security be in the ordinary form or by way of trust for sale on default (*h*). If the tenant for life concur with the tenant in tail in mortgaging for his benefit, upon an agreement for a re-settlement which becomes inoperative, the parties will be remitted to their former rights. In such a case (*i*) redemption was decreed in favour of the tenant in tail against the devisees of the tenant for life, who had paid off the mortgage, and claimed specific performance of the agreement.

529. The remainderman or reversioner has also as against the mortgagee a good right to redeem, and so long as it was the practice of the court to compel the tenant for life to pay one-third of the debt, redemption might be had against him also; but under the present rule, by which the tenant for life keeps down the interest only, the remainderman or reversioner is not allowed to redeem the tenant for life against his will; for if the latter were himself desirous of redeeming, the result might be that he would have to pay a greater rate of interest to the reversioner on the mortgage, than he could procure for the money with which he might have redeemed (*k*). The tenant for life, therefore, has both in suits by the mortgagee for foreclosure, and by the reversioner or remainderman for redemption, the first option to redeem. And the remainderman cannot redeem (*l*) without the consent of the tenant for life, if the latter have procured an assignment of the mortgage, or if the mortgagee have purchased the interest of the tenant for life. It was said, with reference to the remainderman's right to redeem against the tenant for life, that the trustees to

(*e*) Playford *v.* Playford, 4 Hare, 546.
(*f*) Aynsley *v.* Reed, 1 Dick. 249; Evans *v.* Jones, Kay, 29; Earl of Kinnoul *v.* Money, 3 Sw. 202, n.
(*g*) Haymer *v.* Haymer, 2 Vent. 343.
(*h*) Wicks *v.* Scrivens, 1 J. & H. 215.
(*i*) Playford *v.* Playford, supra.
(*k*) Ravald *v.* Russell, Younge, 9.
(*l*) Id.; Raffety *v.* King, 1 Keen, 601.

preserve contingent remainders might do so (*m*) for the benefit of those whose estates they were appointed to support.

530. The tenant for life also, who redeems, cannot compel the remainderman to redeem him, though he or his assignee may bring the remainderman before the court, to be present at the taking of the accounts, and for the establishment of his own security against the estate, paying his costs and adding them to the security; which may be enforced after his death by his representatives.

But if the mortgagee of the life estate file his bill to redeem prior securities, and the tenant for life die before the hearing, the bill must be dismissed with costs; unless perhaps the prior mortgagees in possession have received part of their principal out of the life estate. But a case for relief on that ground must be made out and prayed by the bill (*n*).

531. Where a wife, being tenant for life of her husband's estate, and also his executrix, and taking a benefit under his will, suffered that benefit to be applied in discharge of a mortgage on the estate, and the mortgage term was assigned to attend the inheritance, she was held (*o*) to have no right to a lien upon the estate; the transaction amounting *primâ facie* (and no fraud or mistake was proved or alleged) to a gift to the remainderman.

The omission, in taking the accounts in a foreclosure suit, to make the tenant for life keep down the interest on the mortgage (**1643**), and the payment to him of the surplus purchase-money, is fraudulent as against the remainderman, but gives him no right of redemption against the purchaser, whose title is not vitiated, and who is not responsible for the order of the court (*p*).

532. A jointress has a redeemable interest in the whole estate, a part whereof her jointure consists (*q*). And if she grant a term out of her life interest, though it be for ninety-

(*m*) Pow. Mort. 975, n. (*g*) by Mr. Coventry.

(*n*) Riley *v.* Croydon, 2 Dr. & S. 293; 10 Jur., N. S. 1251.

(*o*) Toplis *v.* Von der Heyde, 4 Y. & C. 173.

(*p*) Blake *v.* Foster, 2 Ba. & Be. 387, 565.

(*q*) Howard *v.* Harris, 1 Vern. 33; and Browne *v.* Edwards (R. L. 1681, fol. 260, cited there.)

nine years, if she so long live, her reversion will yet attract the equity of redemption (*r*).

533. A dowress also may redeem a mortgage for a term of years (*s*). And women married subsequently to the 31st December, 1833, being entitled (*t*) to dower out of equitable, and partly equitable and partly legal estates, it follows that where the right to dower exists they may also redeem mortgages in fee. But as to those married before that day, they cannot generally redeem (*u*) mortgages in fee, made before their marriage; because they are not dowable out of the equity of redemption of such mortgages; nor can they redeem mortgages made subsequent to their marriage where they have barred their dower (*x*). It seems, however, that if a woman join in barring her dower to enable her husband to mortgage, in consideration whereof he agrees that she shall have the redemption, this agreement will be upheld so far as to give her the dower which she barred; but not to give her the whole equity against subsequent mortgagees of the husband (*y*). Nor will the fact of her joining to extinguish her dower (the equity of redemption being limited to her and her husband jointly) afford a presumption of an agreement, that in case of surviving her husband, she shall have the whole equity of redemption (*z*).

If the dowress paid more upon redemption than her proportion of the principal money, she had a right as to the residue to hold the lands over until she was reimbursed (*a*). At present both dowress and jointress would be in the position of an ordinary tenant for life who keeps down the interest, and if he will redeem is presumed to be a creditor for the amount, unless he show an intention to merge the debt (**1418**).

534. The husband surviving the wife and having had inheritable issue (where that is required) is tenant by the curtesy of the equity of redemption of her estate, mortgaged

(*r*) Brend *v.* Brend, 1 Vern. 213.

(*s*) Palmes *v.* Danby, Abr. Eq. Ca. 219, expl. 2 P. W. 716.

(*t*) 3 & 4 Will. 4, c. 105.

(*u*) Dixon *v.* Saville, 1 Bro. C. C. 326; Chaplin *v.* Chaplin, 3 P. W. 229; Williams *v.* Lambe, 3 Bro. C. C. 264.

(*x*) Powell, Mort. 286, note (*s*).

(*y*) Dolin *v.* Coltman, 1 Vern. 294.

(*z*) Jackson *v.* Parker, Ambl. 687.

(*a*) Palmes *v.* Danby, 1 Abr. Eq. Ca. 219; Pre. Ch. 137.

in fee before her marriage, and may redeem; for though the wife has not that actual seisin of the freehold during the coverture which the law requires (*b*) to constitute a tenancy by the curtesy (her possession being in fact but that of the mortgagee), yet her right to the equity of redemption being clothed with possession and with receipt of the profits, there is an actual seisin of an equitable estate, equivalent in the view of a Court of Equity to such legal seisin and sufficient to support the husband's right (*c*).

And there may be curtesy of the wife's trust estate of inheritance, although the rents and profits be given for her separate use (*d*). But if there be a direction that the trustees shall convey to the use of the wife for her life, and after her decease in trust for the heirs of her body, there will be no curtesy, because the trust is executory only, and the wife entitled to no more than a life estate (*e*).

The husband is equally entitled (*f*) to curtesy of the trust estate, though the wife died without having been in possession or receipt from the trustees of the rents and profits, if she were entitled; their possession not being, as against her, adverse.

The Rights of Guardians and Committees.

535. The guardian of an infant heir may redeem a mortgage out of the rents of the descended estate; but not, it is said, any real incumbrance, which is not a direct charge upon the estate (*g*). It is apprehended, that, under their present constitution, judgment debts fall within the rule which enables guardians to redeem (*h*).

536. Committees of a lunatic may also redeem out of the rents and profits (*i*), and, if threatened with foreclosure, it is said they may do so, without leave of the court, out of the

(*b*) Co. Litt. 30 a.

(*c*) Bunb. 347; 2 Abr. Eq. Ca. 594; Casburne *v.* Inglis, 2 Jac. & W. 194; *S. C.* 1 Atk. 603.

(*d*) Roberts *v.* Dixwell, 1 Atk. 607; Morgan *v.* Morgan, 5 Mad. 408.

(*e*) Roberts *v.* Dixwell, supra.

(*f*) Stone *v.* Godfrey, 18 Jur. 162.

(*g*) Palmes *v.* Danby, Pre. Ch. 137.

(*h*) Rolleston *v.* Morton, 1 Dru. & War. 197; Ex parte Boyle, 17 Jur. 979, 981.

(*i*) Ex parte Grimstone, Ambl. 706.

personal estate of the lunatic (*k*); though the prudent and proper course is to obtain an order for the purpose.

Both guardians and committees are by statute authorized to redeem land tax (*l*); but it was said by Lord Eldon, that committees should not do so without the express authority of the court (*m*).

The Rights in cases of Forfeiture and Escheat.

537. The crown may redeem such estates as vest in it by forfeiture (*n*). But if a mortgaged estate be seized by the crown upon the mortgagor's outlawry for high treason and be granted to another, and afterwards the outlawry be reversed, upon the reversal the lessee is restored (*o*) to all that was not answered to the crown, i. e. to all but the mesne profits. His right of redemption, therefore, returns to him (*p*).

The rule, that there is no escheat of a trust estate (*q*), applies to the equity of redemption of a mortgage in fee; for the mortgagee is the legal tenant, whose service is all that the crown, or other lord of the fee, can of right require (*r*). The equity of redemption in such a case becomes extinguished in the estate of the mortgagee, who does not, however, take it absolutely, but as assets for payment of the debts of the mortgagor, whose legal personal representative, therefore, has a right to redeem (*s*); which right has been held to remain intact after more than twenty-one years, in respect of the possibility that a debt on covenant may still arise, or may be then unbarred by lapse of time. But although in this particular there be no difference between an ordinary trust estate and an equity of redemption, yet a difference has been made (but has not altogether passed without question) where the mortgage is for a term only; in which case, if the mortgagor die

(*k*) Powell, Mort. 285 a, note (*r*).

(*l*) 53 Geo. 3, c. 123, s. 2.

(*m*) Ex parte Phillips, 19 Ves. 124.

(*n*) Attorney-General *v.* Crofts, 4 Bro. P. C. 136.

(*o*) Rockley *v.* Wilkinson, Sir T. Jones, 100; Eyre *v.* Woodsine, Cro. Eliz. 278.

(*p*) Peyton *v.* Ayliffe, 2 Vern. 312.

(*q*) Burgess *v.* Wheate, 1 Eden, 177; 1 W. Bl. 123.

(*r*) Beale *v.* Symonds, 16 Beav. 406.

(*s*) Id. Lord Eldon seems to have thought that the mortgagee might refuse to be redeemed; but does not speak with reference to debts; Gordon *v.* Gordon, 3 Sw. 470.

without an heir, the reversion in fee escheats to the crown or other lord. Now here it is held (*t*), that as the lord, taking the fee by escheat in an ordinary case, also becomes entitled, in equity, to the benefit of a term of years attendant on the inheritance (*u*), so he shall have the equity of redemption of a term of years, which is also an estate or interest in the land itself (**464**), and as such is drawn along with the freehold, giving the lord a right to complete his title and to make the term attendant on the inheritance, by redeeming the mortgage. And if the (*x*) mortgagor have died since the coming into operation of the statute 3 & 4 Will. 4, c. 104 (by virtue of which the lord holds (*y*) the escheated land as assets for payment of the last tenant's debts), he gets a right to redeem by means of the statute also; for he may discharge the estate by paying the debt, and will then be entitled to an assignment of the term by which it was secured.

It seems to have been assumed, in another case (*z*), that the equity of redemption of a term might pass with the inheritance to the crown; but it being admitted that the estate was of less value than the debt, it was argued that the mortgagor was a bare trustee for the mortgagee, and that the equity would, therefore, not escheat, but might be conveyed, as if the trustee (the mortgagor) had left an heir, by a person appointed by the court under 4 & 5 Will. 4, c. 23, s. 2; but this view was not adopted, and the suit being an administration suit in which the estate might be sold as against the crown, it was directed, by consent of the mortgagee, that he should take the estate in satisfaction of the debt, with liberty to apply to the crown for a grant of the fee simple. (**967**.)

538. The reservation of the equity of redemption to the mortgagor, his heirs, executors, administrators and assigns, does not prevent the lord from taking by escheat (*a*); for he becomes entitled to an attendant term under the like form of

(*t*) Viscount Downe *v.* Morris, 3 Hare, 394; 13 L. J., Ch. 337.

(*u*) Thruxton *v.* Attorney-General, 1 Vern. 340.

(*x*) Viscount Downe *v.* Morris, supra.

(*y*) Evans *v.* Brown, 5 Beav. 114; Hughes *v.* Wells, 16 Jur. 927.

(*z*) Rogers *v.* Maule, 1 Y. & C. C. C. 4; and decree there.

(*a*) Viscount Downe *v.* Morris, 3 Hare, 394.

limitation; and takes by escheat, as an assign in law, that which belongs to the inheritance; as in the case of (*b*) a rent reserved to the lessor and his heirs, for which the lord taking by escheat may distrain.

Prior to a modern statute, the rule concerning the rights of the lord taking the mortgaged estate by escheat of the *mortgagee*, was (*c*), that in the case of fee simple lands the lord took subject to the equities of the tenant, because the latter had full power to create them without the lord's consent; but as to copyholds and customary freeholds, the title to which is perfected by admission, the lord was not bound unless by admission he assented to the acts of the tenant, and then so far only as he had express or constructive notice of such acts. The lord, therefore, would take absolutely and irredeemably (*d*) an estate to which the tenant, on whose death the escheat happened, was admitted absolutely, and without notice on the court roll, or to the steward or deputy steward, of any condition: but if the surrender were only made subject to the trusts of a deed referred to therein (*e*), the lord would be bound by this or any other constructive notice, and the right of redemption would remain open against him. As against the crown, it was said by Lord Hale (*f*), that only an *amoveas manum* lay, and no right to redeem.

No land, stock, or chose in action (*g*), vested in any person on any trust, or by way of mortgage, or any profits thereof (save as to the beneficial interest therein of any such trustee or mortgagee) (*h*), will escheat or be forfeited to the crown or any corporation or person, by reason of any attainder or conviction of such trustee or mortgagee; but will remain in the trustee or mortgagee, or survive or descend, as if there had been no attainder or conviction.

(*b*) Co. Litt. 215 a.

(*c*) Weaver *v.* Maule, 2 R. & M. 97.

(*d*) Attorney-General *v.* Duke of Leeds, 2 Myl. & K. 343.

(*e*) Weaver *v.* Maule, supra.

(*f*) Pawlett *v.* Attorney-General, Hard. 465; 1 Eq. Ca. Abr. 315; and see Rogers *v.* Maule, 1 Y. & C. C. C. 4.

(*g*) Trustee Act, 1850, 13 & 14 Vict. c. 60, s. 46, replacing the repealed enactments of 4 & 5 Will. 4, c. 23.

(*h*) Sect. 47. See In re Lowe, 12 Jur. 638.

The Right of the Mortgagor's Assignees.

539. The assignees of the mortgagor (*i*) may generally redeem, whether they claim as subsequent mortgagees or by absolute assignment, and as well under a voluntary conveyance as otherwise; for a voluntary conveyance is only void against a subsequent mortgagee to the extent of the mortgage (*k*). The equity of redemption, therefore, remains in the grantee, even where the voluntary instrument contains a power of revocation (*l*). The purchase by the mortgagee of the interest of the heir at law of the settlor, of course puts him in no better position.

540. The right of the *puisné* mortgagee to redeem is not, however, like that of the mortgagor or his representatives, an absolute right, but is only ancillary to his right to work out his remedy against the mortgaged estate by foreclosure; which remedy, being out of the power of the *puisné* mortgagee in the first instance, by reason that the prior incumbrance stands in his way, he is allowed to remove it by redemption. Hence (*m*), no *puisné* incumbrancer can redeem a prior mortgagee adversely, without bringing the mortgagor before the court (**1015**) for the purpose of completing his remedy by foreclosure; and if by any means, as by a covenant not to foreclose till the arrival of a certain period, the *puisné* mortgagee have precluded himself from pursuing that remedy against the mortgagor, he cannot insist that upon paying off the first mortgagee, the latter shall assign the mortgage to him (*n*): for being unable to seek relief against the mortgagor by reason of his covenant, he may not bring him forward at

(*i*) Bunb. 347; 2 Eq. Ca. Abr. 594; Thorne *v.* Thorne, 1 Vern. 182; Rand *v.* Cartwright, 1 Ch. Ca. 59. It has been doubted whether a mortgagor can sue for redemption after conveying his equity to trustees for sale, or whether he should not seek to set aside a sale alleged to be improper. (Per Turner, L. J., in Manser *v.* Dix, 3 Jur., N. S. 252.)

(*k*) Perkins *v.* Walker, 1 Vern. 97; Reeve *v.* Hicks, 2 Sim. & St. 403.

(*l*) Thorne *v.* Thorne, supra.

(*m*) Fell *v.* Brown, 2 Bro. C. C. 276; Palk *v.* Clinton, 12 Ves. 48; Farmer *v.* Curtis, 2 Sim. 466; M'Donough *v.* Shewbridge, 2 Ba. & Be. 555; Woodcock *v.* Mayne, cited 12 Ves. 59.

(*n*) Ramsbottom *v.* Wallis, 5 L. J., Ch., N. S. 92; Coote, Mort. App. 576, ed. 3; Rhodes *v.* Buckland, 16 Beav. 212.

all, and without him the suit will fail as against the prior mortgagee also. Yet the *puisné* incumbrancer is not, in such a case, altogether without remedy, for the court will restrain the first mortgagee from depriving him of his right by a sudden sale of the estate, where it appears that the sale is about to be made for that purpose (*o*).

But this rule will not justify the first mortgagee in insisting (*p*) upon being redeemed by no other means than the ordinary course of the court, where he has filed a bill of foreclosure, and the *puisné* mortgagee has thereupon tendered the principal and interest, and has offered to deposit a sum for costs until the amount due can be ascertained; and the refusal of the mortgagor to concur will not justify the first mortgagee's refusal to assign under such circumstances.

541. If the grantee under a voluntary deed—as a jointress under a settlement made after marriage—will redeem, it must be upon the terms of also redeeming a mortgage subsequent to the deed under which the equity of redemption is claimed, although the subsequent mortgagee had notice of such deed; for the notice does not help the voluntary grantee against the subsequent purchaser (*q*).

542. The assignee of a subsequent mortgagee, after a decree in a foreclosure suit in which his assignor's interest has been bound, ought not to file a new bill against the other parties to the foreclosure suit, praying to redeem the prior and to foreclose the subsequent incumbrancers; and against those parties such a bill will be dismissed with costs (*r*). But against the assignor, an inquiry will be directed of what is due to the assignee for principal, interest and costs, upon payment whereof the assignee will be decreed to reconvey, but in default of payment the assignor will be foreclosed; and in case of such foreclosure the assignee will be entitled to the benefit of the former decree, and to stand in his assignor's place and use his name in prosecuting that suit, with liberty to attend the taking of the accounts in the meantime. It

(*o*) Rhodes *v.* Buckland, supra.
(*p*) Smith *v.* Green, 1 Coll. 555.
(*q*) Gardiner *v.* Painter, Sel. Ch. Ca. 65.
(*r*) Booth *v.* Creswicke, 8 Sim. 352; 8 Jur. 323.

seems, therefore, that an assignee in the above position should pray foreclosure against his assignor, and the benefit of the former decree.

If, however, the assignee have but the dry right to the equity of redemption, and no beneficial interest, or right to the beneficial interest, which he can exercise on behalf of those really entitled, he will not be permitted to redeem. Therefore a bill by an assignee of the equity of redemption, upon trust to sell and discharge debts of the mortgagor, and pay him the surplus (the debts having been paid without any execution of the trusts, and more than forty years having elapsed), was dismissed with costs, the trusts being held to have been determined, and the power to redeem, as ancillary to them, to have consequently failed (*s*).

543. The lessee of the mortgagor (*t*), claiming under a beneficial lease, though it be made after the mortgage, may redeem, the lease being good against the mortgagor. And in Ireland under the Ejectment Statutes, if the trustee of a leasehold interest refuse to redeem upon eviction for non-payment of rent, the *cestui que trust* may do so (*u*).

The Rights of Judgment and other Creditors.

544. Pernors of profits and judgment creditors, including tenants by statute merchant, or staple, may also redeem (*x*). The judgment creditor does not lose his lien on the estate as against the assignees (*y*) of the bankrupt debtor, or as against a purchaser (*z*), under a decree of the court, by not coming in under the commission in the one case, or, in the other, by not proving his debt before the master in pursuance of an advertisement for that purpose; his legal remedy remaining the same as before, and nothing being lost but the benefit which might

(*s*) James *v.* Biou, 3 Sw. 234; Owen *v.* Flack, 2 Sim. & St. 600.

(*t*) Per Lord Mansfield, Keech *v.* Hall, Doug. 21; 2 Cru. Dig. 83.

(*u*) Malone *v.* Geraghty, 3 Dru. & War. 246, 263; 1 H. L. C. 81.

(*x*) Bunb. 347; Stonehewer *v.* Thompson, 2 Atk. 440; Blagrave *v.* Clunn, 2 Vern. 576; Sharp *v.* Earl of Scarborough, 4 Ves. 538; Henry *v.* Smith, 2 D. & W. 390.

(*y*) Stonehewer *v.* Thompson, supra.

(*z*) Barrett *v.* Blake, 2 Ba. & Be. 357.

have been obtained from the produce of the sale. But if by reason of the legal estate being out of the debtor, when the judgment was obtained, the judgment creditor could not proceed under an *elegit*, then it is said a Court of Equity would refuse its assistance against the purchaser under a decree of the court, and would not suffer the judgment creditor to redeem.

If upon the issuing of the execution, which the law concerning judgments formerly required (*a*) to complete the judgment creditor's right against leaseholds and other chattels, the writ were returned without having been put in force, the judgment creditor lost his priority over, and was driven to redeem subsequent incumbrancers (*b*), because the writ after its return was not binding; and this appears to be now the rule (*c*), although under 1 & 2 Vict. c. 110, s. 13, the judgment creditor's right to redeem was complete, without suing out execution (*d*).

545. Where leaseholds were settled by a husband after marriage, and subsequently mortgaged by him, and made redeemable by husband and wife, or either of them, their or either of their executors or administrators, with a proviso for quiet enjoyment by the husband; it having been always in his power to alien the term, and the redemption being given to his executors as well as the wife's, it was held that the equity should belong to the creditors, and that the wife should not redeem (*e*).

If an estate be settled to uses, with a proviso that on the happening of a certain event, and payment of a sum of money, the uses shall cease, and the estate be for the heirs and assigns of the settlor; there (*f*), if the money be not paid within the limited time after the death of the settlor, a judgment creditor may pay it and have the benefit of the redemp-

(*a*) Shirley *v.* Watts, 3 Atk. 200; Angell *v.* Draper, 1 Vern. 399. See King *v.* Marissal, 3 Atk. 192.

(*b*) Williams *v.* Craddock, 4 Sim. 313.

(*c*) See 27 & 28 Vict. c. 112, s. 1.

(*d*) Harris *v.* Davison, 15 Sim. 128.

(*e*) Watts *v.* Thomas, 2 P. W. 634.

(*f*) Frederick *v.* Aynscombe, 1 Atk. 392; and see Blagrave *v.* Clunn, 2 Vern. 576.

tion; for the heirs or executors of the settlor cannot omit to do it to the prejudice of a fair creditor.

546. The general creditors of the mortgagor may also in many cases acquire an interest in the mortgaged estate, which will give them a right of redemption. Thus a creditor who has obtained a decree for sale of the estate in a creditor's suit, may, by a supplemental suit, have a decree for redemption against a person holding and claiming a lien on the title deeds, although such person was not a party to the creditor's suit;—the effect of the decree for sale being to give the creditor an interest to sustain the supplemental suit, that he may get the benefit of that decree (*f*).

And where pending a suit by creditors for a sale of the estate, the mortgagee fraudulently obtained a decree for foreclosure, it was held that they should redeem him notwithstanding the decree (*g*).

Creditors were also allowed (*h*) to redeem (after many years' possession) another creditor, who, upon the mortgagee's obtaining a decree for foreclosure, had paid off the debt, and agreed that the others might redeem him by paying the money on a certain day, on the ground, that the agreement operated as a mortgage, and gave a new equity of redemption to the creditors. A specialty creditor in equity may also redeem; as a wife by virtue of a bond given her by her husband before marriage, and conditioned to leave her a sum of money if she survived him (*i*); though the bond be released at law by the marriage, she may redeem the husband's mortgaged estate, and hold over both for the bond debt and what she paid for redemption.

So, if by agreement with the mortgagor, the creditor become in effect assignee of the equity of redemption, as where a creditor agreed with the mortgagor to give up his securities, and assist in a suit which the mortgagor was then prosecuting against the mortgagee for an account and redemption, receiv-

(*f*) Christian *v.* Field, 2 Hare, 177.
(*g*) Soley *v.* Salisbury, 9 Mod. 153; 2 Abr. Eq. Ca. 600.
(*h*) Exton *v.* Greaves, 1 Vern. 138.
(*i*) Acton *v.* Pierce, 2 Vern. 480; Pre. Ch. 237.

ing in return a lien upon the securities in the hands of the latter; it was held, that the creditor's character was that of an assignee, and his proper relief, not specific performance, but an account of the transactions between the mortgagor and mortgagee, and redemption on payment of what should be due upon the mortgage in case the mortgagor should not pay the plaintiff the amount due to him (*k*). So, in the case of creditors being trustees under a deed for payment of debts. And if a debtor (*l*), believing himself to be owner in fee subject to mortgages, convey all his interest in the mortgaged estate to trustees for the benefit of creditors; though he have no interest at the time, yet if he afterwards become entitled to the fee, he cannot deprive the creditors of an estate which he sold them for valuable consideration, viz. a release from his debts. Therefore they have a right of redemption prior to his.

547. But not the creditors themselves coming in the first instance, as a matter of course, because the general principle is, that those only are entitled to redeem who have a right to call for the legal estate.

However, if creditors or legatees can make out that the trustees are colluding with the mortgagee to prevent the recovery of their claims, or that they were called on to redeem and refused to do so, or that they are unsafe, it seems that they may themselves redeem (*m*).

And if the assignees of a bankrupt refuse to bring a bill to redeem for the benefit of the estate, any creditor may do so under peril of costs (*n*) (**1111**). But liberty to redeem will be given to the assignees first and then to the plaintiff.

548. The sequestrators of a mortgaged estate have been allowed to redeem (*o*).

(*k*) Hartley *v.* Russell, 2 Sim. & St. 244.

(*l*) Smith *v.* Baker, 1 Y. & C. C. C. 223.

(*m*) Troughton *v.* Binkes, 6 Ves. 573. Per Lord Wynford, 1 Knapp, 229.

(*n*) Franklyn *v.* Fern, Barn. 30, 32; 2 Eq. Ca. Abr. 605.

(*o*) Fawcet *v.* Fothergill, Dick. 19.

The Right of the Assignees in Bankruptcy.

549. If the owner of the equity of redemption become bankrupt or enter into a deed of arrangement or composition with his creditors, his assignees or trustees are entitled to redeem his mortgages upon the vesting in them of the equity of redemption. Under the Bankruptcy Act, 1849 (*q*), which provides, that if any bankrupt shall have granted, conveyed, assured or pledged any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, pledge or deposit being upon condition or power of redemption at a future day, by payment of money or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money or other performance according to such condition, as fully as the bankrupt might have done; and after such payment, tender or performance, such real or personal estate may be sold and disposed of for the benefit of the creditors. The statutory power only vests the mortgaged estate in the assignees where a tender is made before the day fixed in the condition, if a day has been fixed for repayment. In any other case the assignees must go to a court of equity for redemption (*r*). The bankrupt cannot redeem in his own name (*s*); and he had no right of redemption before the bargain and sale to the assignees, where that was necessary, even in respect of the possibility that his real estate might vest in him by payment of his creditors, because such possibility did not amount to an interest (*t*); but where the suit was commenced before the bankruptcy, it was said that a right of redemption would be given to the bankrupt (*u*). And where his debts are paid he may sue in respect of his right to the surplus, for which the assignees are trustees for him (*x*).

(*q*) 12 & 13 Vict. c. 106, s. 149; and see ss. 142, 153, and 24 & 25 Vict. c. 134, ss. 108, 117, 197.

(*r*) Dunn *v.* Massey, 6 A. & E. 479; 1 Jur. 240, on the corresponding enactment in 6 Geo. 4, c. 16, s 70.

(*s*) Spragg *v.* Binkes, 5 Ves. 583.

(*t*) Lloyd *v.* Lander, 5 Mad. 282.

(*u*) Garth *v.* Thomas, 2 Sim. & St. 188.

(*x*) See Act of 1849, s. 197; Wearing *v.* Ellis, 6 De G., M. & G. 596.

The Rights of Devisees.

550. The devisee of the whole or of part of the equity of redemption, under a devise made either after or before the condition broken, may redeem (*y*); and even before the statute 1 Vict. c. 26, he might redeem a mortgage made after the date of the will, the revocation being only *pro tanto*. The devise of the inheritance carries with it the right to redeem a mortgage for a term; therefore if a mortgagor, by his will, direct payment of the mortgage and assignment of the mortgage term to one, but devise the fee to another, the devisee of the fee shall still redeem the term (*z*). And a devisee may redeem against a person claiming as purchaser of the equity of redemption from a pretended heir, if such purchaser had notice of the pendency of a suit to establish the will (*a*); for, having notice, he is bound by the decree establishing the will.

Legatees whose legacies are charged on the mortgaged estate may redeem (*b*).

The Rights of Real and Personal Representatives.

551. At law if a feoffment be made in mortgage, upon condition that the feoffor shall pay a sum at the day fixed in the mortgage, though he die before the day his heir may pay or tender the money, and may enter if the feoffee refuse to receive it, though the heir was not mentioned in the condition; because he has an interest of right in the condition, and the intent was only that the money should be paid at the day. But the feoffee is not bound to receive tender made by a stranger of his own head who has not any interest. And if the condition be merely for payment to the feoffee, no day being fixed, a tender by the heir will be void, because the feoffor has his whole life for payment, and at his death the time for payment is past (*c*).

552. The heir of the person entitled to redeem, whether

(*y*) Saunders *v.* Hawkins, 8 Vin. Abr. 156; 2 Eq. Ca. Abr. 771; Hall *v.* Dench, 1 Vern. 342; 1 Vict. c. 26, s. 3.

(*z*) Amhurst *v.* Litton, 2 Eq. Ca. Abr. 603.

(*a*) Finch *v.* Newnham, 2 Vern. 216.

(*b*) Faulkner *v.* Daniel, 3 Hare, 199; Batchelor *v.* Middleton, 6 Hare, 78.

(*c*) Litt. ss. 334, 337.

under the ordinary rules of descent, or by custom (*d*), has the same right to redeem as his ancestor (*e*); and it has been held (*f*), where the latter had not been heard of for thirty years, that a presumption of his death arose upon which his heir apparent might redeem. The assignee of an heiress at law and her husband, whose title depended upon the death of one who had gone beyond seas, and had not been heard of for a similar period, is also stated (*g*) to have been allowed to redeem, it being observed by Lord Talbot, C., that, as the mortgagee has but a conditional interest in the land, and can only be redeemed on payment of principal, interest and costs, such evidence [presumption] of death would be sufficient. There appears to be no recent case from which it can be stated with certainty, what is the shortest period of absence without tidings, after which the heir apparent of the mortgagor would at the present day be suffered to redeem. The presumption of the continuance of life is generally considered to cease at the expiration of seven years from the time when the absent person was last heard of; which rule is generally considered to be by analogy to the statutes 1 Jac. 1, c. 11, for preventing polygamy, and 19 Car. 2, c. 6, concerning certain estates for life (*h*).

(*d*) Fawcett *v.* Lowther, 2 Ves. 304.

(*e*) Bunb. 347; Hawkins *v.* Chappell, 1 Atk. 621.

(*f*) S. N. 2 Eq. Ca. Abr. 594, marg. note.

(*g*) Masten *v.* Cookson, 2 Eq. Ca. Abr. 414; but very ill reported.

(*h*) See Best on Presumptions; Hubback, Ev. of Suc. 170; Phillips, Ev. i. 449, ed. 9. But it seems likely that the statutes adopted an earlier presumption, of which the traces yet remain. *Action of dower.* Plea that the husband was still living. The wife produced witnesses (one of whom was the brother of her husband), "whose testimony," says Dyer, "tended to no plain proof, but by conjectures and presumptions. That the husband departed the realm in the first year of Queen Mary, on account of religion, and was a minister, *and for those seven years had been absent.* And in the time of this religion here restored he had not returned, nor no merchant of that country, to wit, Germany, or Englishmen that travel in those parts give account of his being alive, nor no token thereof; p. q. ils conclude in lour consciences that they rather think him dead than alive." And no witnesses being produced on the other side, judgment was given for the demandant. (Thorn *v.* Rolff, Pasch. T., 2 Eliz.; Dyer, 185; Anderson, 20; and shortly in Moore, 14.) The rule seems to have been recognized in this case; but the actual period was a little less than seven years, inasmuch as Mary came to the throne 6th July, 1553, and the case was heard in Easter Term, 2nd Eliz. (1560). It is singular that Sir S. Romilly is

There are many cases in which, after periods of less than thirty years, the property of absent persons has been held, on the presumption of death, to have vested in their representatives; yet these seem to have been determined for the most part on their own circumstances, and it would probably require a strong case of inquiry, and negative evidence, to induce the courts to allow redemption after an absence of seven years only.

It does not appear that a less period than ten years is generally acted on, and where that period was adopted (*i*), considerable exertions had been made to obtain evidence; and the person had disappeared under circumstances which made his death not improbable. Absence without tidings has been acted upon in other cases (*k*), where the periods have been thirteen years and upwards, and inquiries had been made unsuccessfully to establish the fact of death. After an absence of twenty-seven years, with evidence of similar inquiries, administration with the will annexed has been granted by the Ecclesiastical Court (*l*). And after less than nine years, a person who would be entitled to sue, in case of the death of the absent person, has been allowed to do so for the security of the property (*m*). But the court has refused to presume death after no tidings had been had for upwards of nineteen years, though considerable inquiry had been made, where the correspondence of the absent person with her family ceased under circumstances which made it probable that she would no longer wish to continue it; namely, after they had reproached her for having changed her religion: it being observed, that the presumption of death rests on the probability that the person, if alive, would have communicated with his friends (*n*).

Although it has been held, that the rule does not extend to

reported to have mentioned this case, as decided by analogy to the statute of Charles II. (See 6 Ves. 606.)

(*i*) Dowley *v.* Winfield, 14 Sim. 277.

(*k*) See 1 Y. & C. C. C. 117; 17 Jur. 570; 6 Ves. 605; 8 Sim. 443; 7 Ves. 590.

(*l*) Dean *v.* Davidson, 3 Hagg. Eccles. R. 554.

(*m*) Danby *v.* Danby, 5 Jur., N. S. 54.

(*n*) Bowden *v.* Henderson, 2 Sm. & G. 360.

any presumption as to the time of death within the seven years (*o*), yet there are not wanting authorities to show that the contrary is the case under particular circumstances. Thus Lord Eldon presumed (*p*), that a person who had been absent twenty-three years, and who at the time of his disappearance was in very bad health, and was to have returned in six months, died within from five to six years from the commencement of absence. And where persons were on board a vessel which sailed on a voyage from the West Indies during the hurricane months, and was never more heard of, and there was evidence of tempestuous weather, which she might well have (*q*) fallen in with, their deaths were presumed to have happened during that voyage. And Sir L. Shadwell, V. C. E., has gone so far as to hold (*r*), that a person presumed to be dead, after an absence of about ten years, might be presumed to have died in the lifetime of his father, which took place about twenty months only from the time when the absent person was last heard of; although there seemed to be no special circumstances to warrant such an inference.

But it seems, that neither at any particular period, nor at all, will death be presumed even after so long an absence as twenty-three years, without any certain tidings of his existence, unless diligent inquiries have been made to discover the missing person (*s*).

553. Where the ownership of property is determined to be altered on the presumption of death, it is usual (*t*) to require, from the person declared to be entitled, security to refund in case of the re-appearance of the absent owner (*u*).

(*o*) Nepean *v.* Doe, 2 M. & W. 894; Lamb *v.* Orton, 6 Jur., N. S. 61.

(*p*) Webster *v.* Birchmore, 13 Ves. 362.

(*q*) Sillick *v.* Booth, 1 Y. & C. C. C. 117.

(*r*) Dowley *v.* Winfield, 14 Sim. 277.

(*s*) Re Creed, 1 Drew. 235.

(*t*) Dowley *v.* Winfield, 14 Sim. 277; Bailey *v.* Hammond, 7 Ves. 590.

(*u*) The *Code Napoleon* carefully provides for the destination of the property of absent persons, and specifies minutely the several periods at which the presumption of death arises from absence, and by lapse of time becomes converted into judicial certainty. A person deemed to be absent, within the meaning of the law, is described as one whose residence is unknown, of whom there are no tidings, and whose existence is therefore uncertain. The first period fixed is that of "presumption of absence." It comprises the interval between the disappearance or last news of the absent person and the "decla-

554. A *primâ facie* title to the equity of redemption is sufficient. Therefore, where the alleged heir proves his descent to the satisfaction of the court, he will be allowed to redeem (*x*) at once, notwithstanding the complicated nature of the pedigree, against a person filling the character of assignee of the mortgage term with notice of the plaintiff's claim, but himself claiming as heir at law; the redemption of the mortgage being the only thing determined by the decree, and the defendant not being prevented from contesting the plaintiff's claim elsewhere. But a person claiming as heir cannot rest his claim upon more than one foundation. So that where a plaintiff, suing as heir (*y*), stated in his bill the purchase by himself of the title of another alleged heir, and he himself being afterwards found not to be heir, filed a supplemental bill claiming thereby the relief first asked for in right of the purchased title, a demurrer was allowed.

555. The heir at law has no other right of redemption than that which is founded upon his property in, and owner-

ration of absence," and it lasts four years, in case the absent person has left no power of attorney, but otherwise ten years. Application may then be made for the "declaration of absence," but another year must always elapse before that declaration can be made, which is to give time for inquiries by the public officers charged with that duty. The declaration of absence creates provisionally, from the time of the disappearance, all the rights which actual death, if proved, would create absolutely. Such rights may be demanded (upon security being given) by the heirs presumptive at the time of disappearance or of the last tidings, by legatees, donees (under certain circumstances), donors, with right of reverter by survivorship, and owners of property of which the absent person had the beneficial enjoyment. At the end of thirty years from the "declaration of absence," or of one hundred from the death of the absent person, the third period, called order for final possession, commences, and lasts as long as there is any uncertainty as to the existence of the absent person. Real estate may neither be aliened nor mortgaged during the provisional enjoyment; but after the lapse of the thirty or one hundred years' period, the securities are discharged, the property distributed, and the final decree of order for final possession pronounced. Those who enjoy the goods of the absent person must account for a fifth part of the income if he reappear within fifteen years; after that period for a tenth only, and after thirty years' absence they take it absolutely. Provision is also made for the recovery of his property, and the price of so much of it as has been sold, in case of the reappearance of the owner. *Code Civil*, 112—138; *Mourlon's Rep. Ecr. sur le Code Civil*, 1*er Ex.* i. 204, &c.

(*x*) Lloyd *v.* Wait, 1 Ph. 61.

(*y*) Tonkin *v.* Lethbridge, G. Coop. 44.

ship of, the estate (*z*); the conversion of which into personalty by the mortgagor, as by an irrevocable conveyance to trustees for the benefit of creditors, with a trust of the surplus for the mortgagor, his executors, administrators and assigns absolutely, will therefore destroy the heir's right to redeem (*a*). And where the deed has thus pointed out the destination of the property, the nonconversion of any part of it during the life of the mortgagor will give no right to the heir at law, the question being not as to the state in which the surplus was found, but as to the character given it by the deed; and the *onus* being upon the heir at law to prove the reconversion.

An attempt by a settlor to redeem a mortgage on the settled property, after the date of the settlement, in a suit which did not seek to displace the trustees and to which they were not parties, so far from being inconsistent with the settlement, was held to be an act done in pursuance of the settlor's covenant to assist in executing the trusts of the deed (*b*).

556. Where a mortgage was made of the wife's land by her and her husband, with a fine; and part of the debt, having been discharged by the husband, was again borrowed by him of the mortgagee without any fine, but with an agreement (to which the wife was a party, and which was endorsed on the mortgage), that the land should be charged with the new loan, the heir of the wife was not permitted (*c*) to redeem without payment of the whole amount due with interest and costs; the mortgagee having, in the words of Lord Nottingham, "as good a title to the land by the forfeiture, and as much equity to the money as the heir to the land."

If there be co-heiresses of the equity of redemption, and the mortgage be devised to one of them, she may be sued by the other for the redemption of her moiety (*d*). But the heir and devisee (*e*) of the mortgagor, both claiming the equity of redemption, cannot be co-plaintiffs in a redemption suit, for

(*z*) 1 Atk. 622.

(*a*) Griffith *v.* Ricketts, 7 Hare, 299; 14 Jur. 166; Biggs *v.* Andrews, 5 Sim. 424.

(*b*) Griffith *v.* Ricketts, ubi sup.

(*c*) Rayson *v.* Sacheverel, 1 Vern. 41; 2 Ch. Ca. 98.

(*d*) Newling *v.* Abbott, 2 Eq. Ca. Abr. 596.

(*e*) Cholmondeley *v.* Clinton, 4 Bligh, 1; but see now 15 & 16 Vict. c. 86, s. 49.

there can be no decree between plaintiffs having adverse rights. If the equity passes by the will, the will must be established against the heir, who should be then a defendant, and so *vice versâ*. And this difficulty cannot be avoided by stating an agreement to divide the property, because such an agreement concerning a litigated estate is bad.

557. If the mortgagor die leaving a daughter, and his wife *priviement ensient* of a son, and the daughter pay the money at the appointed day, and afterwards the son is born; it has been held by eight judges against two (the other two being doubtful) (*f*), that the daughter shall retain the land. For which the reasons were given, that she had recovered it by her own vigilance, and was entitled to hold it as a purchaser; that if she had not paid the money, the land would have been lost; and that she had no remedy for the money, and if the son were to have the land she would lose both. But the dissentient judges said that she paid the money voluntarily, and at her own peril; and that she had the land as heir, and should be defeated by the birth of a nearer heir.

Mr. Powell and his editor Mr. Coventry differ in opinion upon this case (*g*); the former considering that the question depends upon the degree of pressure under which the money was paid; so that if the daughter paid it officiously, the equity would be against her, but if to save foreclosure, the birth of the son should not divest her estate, because the land would have been lost, and the maxim *qui sentit onus sentire debet et commodum* would apply; whilst Mr. Coventry thought, that the money having been paid at the day, and the redemption being therefore a legal redemption, it was right *at law*, that the daughter should hold absolutely for the reasons given by the majority of the judges; but that if it had been a case of equitable redemption to prevent foreclosure, it might have been otherwise.

(*f*) Kirton's case, Cro. Car. 87; 1 Abr. Eq. Ca. 315.

(*g*) Powell, Mort. 317 a, and note (*u*), 6th ed. The qualified heir is entitled to the intermediate rents, whether received or due, and both of fee simple and entailed estates; on the principle of the feudal law—that he may discharge the services of the lands. (Richards *v.* Richards, Joh. 754; 6 Jur., N. S. 1145.) But it seems to be otherwise as to rents not received,

The doctrine of the majority of the court seems to be in fact correct as a legal decision; for it is clear that if there had been no redemption at the day, the estate would have been irrecoverably gone at law; and the equitable doctrine of redemption was yet in its infancy, and vehemently opposed by the courts of law. But at the present day it is submitted, that there would be ground for the interference of a court of equity; for, though by the legal doctrine, the estate would still be forfeited at law, yet the equitable right of redemption after forfeiture would save it, and it would *not* be lost to the heir merely by non-payment at the day. Therefore the payment by the daughter, to prevent forfeiture at law, would be officious and savouring of fraud, as being made only to get possession of the estate.

558. Although a person, beneficially interested in the equity of redemption of a freehold estate, may redeem if the devisees in trust refuse to do so, he cannot redeem after becoming bankrupt; nor acquire a right to redeem by taking upon himself the character of administrator de bonis non of the mortgagor, though the equity of redemption was devised to the trustees upon trust for the payment of debts. Such remedy as he has is against the trustees to compel the performance of the trusts (*h*).

559. The equity of redemption of a mortgage of leaseholds for a subsisting term of years, or of other chattel interest, will vest in the personal representative of the mortgagor (*i*); but it is otherwise of a term created out of the inheritance for the purpose of the security (*j*), which cannot be redeemed by the legal personal representatives of the mortgagor, even for the purpose of making the property available for the intestate's debts (*k*).

560. If the administrator of a lessee for years mortgage the term, the property will be altered; and it was held by Lord

where trustees hold the legal estate. (Goodall *v.* Gawthorne, 2 Sm. & G. 375.)

(*h*) Fray *v.* Drew, 11 Jur., N. S. 130.

(*i*) 2 Vern. 177.

(*j*) Bradshaw *v.* Outram, 13 Ves. 234.

(*k*) Catley *v.* Simpson, 33 Beav. 551; 10 Jur., N. S. 993.

Nottingham, that as he becomes liable to a *devastavit*, in case enough were not left to pay the debts, the equity of redemption belongs to him in his own right, and his executor shall have it that he may discharge this liability (*l*). The executor of the administrator who has mortgaged was therefore held entitled to redeem, and not the administrator *de bonis non* of the lessee. But it has since been held (*m*), that though an action on the deed could only be brought in the name of the personal representative of the administrator who made the mortgage, yet the question in equity being who is entitled to the estate, and the administrator *de bonis non* being ultimately entitled to the reconveyance if there be no claim by the representative of the administrator in respect of disbursements by him for the benefit of the estate he is also the person entitled to redeem; and that his right cannot be controverted by the administrator *de bonis non*, notwithstanding the supposed authority of Lord Nottingham to the contrary. In the ordinary case of redemption by an administrator, if he die before the inrolment of the decree, his title being gone, the decree shall not be enrolled for the benefit of his administrator (*n*).

But if one executor mortgage the testator's estate ostensibly for executorship purposes, and die, the surviving executor may sue for redemption; though, if he be also the representative of the executor who mortgaged, he cannot file a bill to impeach the mortgage, or, in the alternative, to redeem, because he cannot impeach a deed executed by the person whom he represents; and having the mixed character of a person who cannot sue, and of the representative of one who could have done so, he cannot sever those characters, and sue as if he had filled one of them only (*o*).

561. The executor of one outlawed may redeem the out-

(*l*) Butler *v.* Bernard, Freem. Ch. Ca. 139; 1 Ch. Ca. 224; 3 Y. & C. 33 n, from Lord Nottingham's MS.; Skeffington *v.* Whitehurst, 3 Y. & C. 1.

(*m*) Skeffington *v.* Budd, 9 Cl. & Fin. 219.

(*n*) 2 Ch. Ca. 248, cit. 1 Eq. Ca. Abr. 162.

(*o*) Miles *v.* Durnford, 2 Sim., N. S. 234; 2 De G., M. & G. 641.

law's mortgaged leasehold, which had become forfeited, after reversal of the outlawry (*p*).

562. Personal representatives cannot, as a general rule, sue *in formâ pauperis* (*q*); and an executor who had obtained an order to sue in that manner for redemption was dispaupered (*r*). But this, according to the report, was not done on the authority of the general rule, but on the ground that a plaintiff who offers to redeem must have the means of doing so; an argument which is not just, because then no plaintiff could sue for redemption *in formâ pauperis*, the contrary of which is shown by practice if not by direct authority (*s*); and not conclusive, because it may be that a person will be found to take a transfer of the security before the day fixed for redemption arrives.

563. It is said (*t*) that the right to redeem goods which have been pledged is only personal where no time has been fixed for payment, and consequently that, though the pledgor, so long as he is not called upon to redeem, may do so at any time during his life, his representatives cannot redeem after his death. According to Story (*u*), there are cases in equity in which the right has been enforced in favour of representatives. But the English cases which he cites do not support the assertion. In two (*x*), the question of the executor's right was not raised; and the report of Mr. Vernon (who took part in the discussion) and the registrar's book (*y*) both show that in the first the pledgor himself was the original plaintiff, and that a time was fixed for redemption. In the second (*z*), although the chattels were at first pledged, it seems that a mortgage was afterwards created. A third authority states the point as doubtful (*a*).

(*p*) Peyton *v.* Ayliffe, 2 Vern. 312.

(*q*) Dan. Ch. Pr. 38, ed. 4.

(*r*) Fowler *v.* Davies, 16 Sim. 182.

(*s*) Batchelor *v.* Middleton, 6 Hare, 86.

(*t*) Ratcliff *v.* Davis, Yelv. 178; 1 Bulst. 29.

(*u*) Bailments, § 348; Eq. Jur. § 1032.

(*x*) Demainbray *v.* Metcalf, 2 Vern. 691, 698; Pre. Ch. 420; Vanderzee *v.* Willis, 3 Bro. C. C. 21.

(*y*) Reg. Lib. A. 1715, 108.

(*z*) Vanderzee *v.* Willis, supra.

(*a*) Com. Dig. 5, 149; citing Croke's Rep. of Ratcliff *v.* Davis, in which the judges differed on the point.

It is, however, agreed that the pledgor's executor may redeem, if a day were fixed for the redemption (*b*).

The Rights of Members of Benefit Building Societies.

564. The rights upon redemption by members of benefit building societies, to whom advances have been made by their society on mortgage security, are somewhat different from the rights of ordinary mortgagors. The statute (*c*) which regulates such societies, enables them to raise, by the subscriptions of their members, [in] shares not exceeding the value of 150*l.* each (such subscriptions being limited to 20*s.* per month for each share), a stock or fund to enable each member to receive, out of the funds, the amount or value of his or her shares for the purpose of acquiring real or leasehold estates, to be secured by mortgage to the society until the amount or value of the shares advanced has been fully repaid to the society with interest, and all fines or other payments in respect thereof. And no members are entitled to receive, from the funds of the society, any interest or dividend by way of annual or periodical profit upon any shares in the society, till the amount or value of his or her share shall have been realized; except on the withdrawal of such member according to the rules of the society.

In a case (*d*) of an advance made to a member of a building society under regulations by which advances could be made to none but a member, and by which the advance was made in the form of a payment of the present value of his share, and the mortgage deed expressed the intention to be to secure the regular payment of the subscriptions, redemption fee, and other monies which should become payable by the mortgagor in respect of his shares; and the trust was to permit him to enjoy the property upon making such payments; but upon default, in case the income should be insufficient for

(*b*) 1 Bulst. 29, per Croke, J.

(*c*) 6 & 7 Will. 4, c. 32, s. 1.

(*d*) Mosley *v.* Baker, 6 Hare, 87; 3 De G., M. & G. 1032; and see Seagrave *v.* Pope, as reversed on appeal, 1 De G., M. & G. 783; 16 Jur. 1099; see Set. Dec. 483, ed. 3.

those purposes, to sell and apply the proceeds in making such payments, with a declaration that in case of sale all monies, which should afterwards become due in respect of the shares, should be considered as due at the time of sale, and be paid out of the proceeds accordingly: it was held, that the advance was not a mere loan to a stranger, out of the society's funds, but a loan of the then present value of the mortgagor's interest in his shares, to which if he had been in the position of a non-advanced member, he would not have been entitled till the shares were paid over at the dissolution of the society: and that no change had taken place in his liability to make the monthly and other payments which formed the price of his shares, until the arrival of that period. So that he could only redeem on the terms of paying up the amount of all these future subscriptions. And that the provision, that all monies which should become due in respect of the shares after a sale, should be considered due at the time of sale, applied to the case of redemption, and the accounts must be taken on the footing that all future payments to the time of dissolution were already due, and not by taking the present value of such future payments.

565. The terms of limiting the liability of the mortgagor to the payments he would have to make during the probable duration of the society, are only proper where, as in the case of Mosley *v.* Baker, the deed provides that the payments in case of sale (or redemption) are to be calculated according to the probable duration of the society, and there is an exercise of the power of sale. If there be no exercise of the power, or provision for calculating the probable duration of the society if it be exercised, the direction will be to ascertain the longest period during which the society may *possibly* last, from the time when the notice is given to redeem; having regard to its net assets, and to the amount of monthly subscriptions and redemption money then continuing payable, and to the number of shares to be provided for. And it will be declared that the mortgagor shall be charged with all subscriptions and redemption money, which will become due and payable by him, assuming the society to endure for the whole

of that period, such money to be treated as a debt presently due from him (*e*).

566. And though it will be proper to make no allowance to the mortgagor in respect of profits, where the redemption takes place at a period at which a withdrawing member could have obtained, by the society's rules, no right to profits; yet if there be a provision giving profits to a redeeming member, irrespective of any fixed period from the commencement of the society, or from his becoming a member thereof; or, if according to the rules, he have become entitled on redemption to bonuses or profits on his shares, the redeeming mortgagor will be entitled to credit for the same amount of bonus as had been paid to withdrawing members at the time when notice was given of redemption (*f*): and this, although the amount was in fact a greater sum than the society's funds could bear (*g*).

567. If the rules of a benefit building society expressly provide that an advanced member may redeem, on payment of his subscription to a certain period, being the period calculated for the duration of the society, the member may redeem at that period, though the failure of the funds to meet the amount of the share proposed to be realized for each member makes it necessary to continue the society for a longer period; and the society is not entitled to retain the deeds as a security for the subscriptions to become due from the redeeming member during the continued period (*h*).

568. In a suit concerning a mortgage to a building society, the society, insisting that the mortgagor shall only redeem subject to his liabilities as a shareholder, must show plainly that he is a member of the society, of which fact the society's book containing the mortgagor's name is primary evidence,

(*e*) Fleming *v.* Self, 3 De G., M. & G. 997; 19 Jur. 25.

(*f*) Fleming *v.* Self, sup., including redemption monies paid in by the mortgagor. (Smith *v.* Pilkington, 1 De G., F. & J. 120; 4 Jur., N. S. 58; and see Archer *v.* Harrison, 7 De G., M. & G. 404; 3 Jur., N. S. 194.)

(*g*) Fleming *v.* Self, sup.; and see the original decree by Sir W. P. Wood, V.-C., Kay, 518.

(*h*) Sparrow *v.* Farmer, 26 Beav. 511; 5 Jur., N. S. 530; Handley *v.* Farmer, 29 Beav. 362. As to the effect of the rule on the continuance of the society, see Farmer *v.* Smith, 4 H. & N. 196; 5 Jur., N. S. 533, n.

where the rules of the society direct that the name of each member be inserted in a book (*i*).

If the mortgagor rest his case upon the terms of the mortgage deed, not seeking to have it reformed, he cannot object that the terms of the deed depart from the rules of the society (*k*).

569. A building society, under the act of Will. 4, may advance money to strangers as well as to its own members, but it seems to be usual that persons taking advances shall become members (*l*). It has, however, been said to be a fraud on the statute (which was meant to enable industrious persons to lay out small sums in the purchase of land, or the purchase or erection of buildings), for a joint stock company, established for a different purpose, to borrow money; and for that purpose to affect to become members of these societies. And it has been held (*m*), that such companies cannot hold shares in them, and that if a building society lend money to a company, the latter may redeem on the usual terms of redemption, and without respect to the liabilities of shareholders.

570. The form of the award provided in the schedule of the act 10 Geo. 4, c. 56 (the provisions in which, for arbitration of disputes between friendly societies and their members, are incorporated in the act 6 & 7 Will. 4, c. 32) (*n*), and the language of the act itself, which provides no means of working out decrees for redemption or delivery of deeds, or consequential directions, and does not go beyond mere questions of expulsion or payments of money, leave untouched the jurisdiction of Courts of Equity on matters concerning the redemption of mortgages or breaches of covenant in the mortgage deed; or to which the form of award is otherwise inapplicable (*o*).

571. A suit for the redemption of property mortgaged by

(*i*) Dobinson *v.* Hawks, 16 Sim. 407.

(*k*) Mosley *v.* Baker, 3 De G., M. & G. 1032.

(*l*) Cutbill *v.* Kingdom, 1 Exch. Rep. 494.

(*m*) Dobinson *v.* Hawks, 16 Sim. 407.

(*n*) Sects. 27, 28.

(*o*) Fleming *v.* Self, Kay, 518; 3 De G., M. & G. 997; 1 Jur., N. S. 25; Morrison *v.* Glover, 4 Exch. Rep. 430; Reg. *v.* Trafford, 4 El. & Bl. 122; 19 Jur. 252. As to the effect of the arbitration clause on the right to sue for subscriptions, see Farmer *v.* Giles, 8 W. R. 649.

a member of a building society, on payment of what shall be found due from him, will be treated as a suit for settling the rights of the parties, and the plaintiff may be ordered to pay a sum found due from him to the society, though it be in excess of the amount secured by the mortgage (*p*). A member of a building society is liable on the covenant in his mortgage to pay subscriptions, though he ceased to be a member before the subscriptions fell due (*q*), and he cannot redeem without paying fines which are properly due from him (*r*).

(*p*) Handley *v.* Farmer, 29 Beav. 362.

(*q*) Farmer *v.* Giles, 8 W. R. 649.

(*r*) Parker *v.* Butcher, L. R., 3 Eq. 762.

CHAPTER V.

OF THE RIGHT OF THE MORTGAGE CREDITOR BEFORE AND PENDING SUIT TO THE PROTECTION OF THE SECURITY, AND TO ACCRETIONS THERETO; AND AS TO THE CUSTODY AND PRODUCTION OF THE TITLE DEEDS.

572. *Of the Protection of the Security, and of Accretions thereto.*
579. *Of the Custody and Production of the Title Deeds.*

Of the Protection of the Security, and of Accretions thereto.

572. From the time of lending his money, the mortgagee, whether he be in or out of possession, acquires certain rights, both as regards the estate itself, and his title to it; by virtue of which, the latter, such as it may be, and so far as it depends upon his possession of the deeds, or other indicia of title, is secured against the interference of any adverse claimant; and the former is preserved from deterioration in the hands of the mortgagor, or of any other person to whose rights those of the mortgagee are superior. *First*, as regards the estate: the mortgagee may not only at all times restrain such acts as the mining under buildings, so as to endanger their stability (*a*), but if he show that the security is insufficient (that is, it seems, that the act complained of will not merely reduce its value below the actual amount of the debt, but will substantially impair the value which was the basis of the original contract), he may, whether his security be in fee or for a term, restrain acts which lessen its value, such as the removal of valuable fixtures (*b*), or the cutting of timber (*c*), and even the cutting

(*a*) Dugdale *v.* Robertson, 3 Jur., S. 687; 3 K. & J. 695.

(*b*) Ackroyd *v.* Mitchell, 3 L. T., S. 236.

(*c*) Usborne *v.* Usborne, 1 Dick. 75, and cases there; Cox *v.* Goodfellow, 8 Ves. 105 a, note; Hippesley *v.* Spencer, 5 Mad. 422; Humphreys *v.* Harrison,

of underwood at unseasonable times, or such as is of improper growth for cutting (*d*); but as underwood is treated as the ordinary fruit of the land, the cutting of it by the mortgagor, though insolvent, and even though it be expressly included in the security, will not be prevented if it be done at seasonable times and in a husbandlike manner; except, it seems, where the mortgagor has been made a bankrupt, in which case it was prevented by Lord Eldon, on the ground that the mortgagee's right was to have the estate left as it was at the date of the bankruptcy, and to prove for the rest of the debt (*e*); though he afterwards gave the reason that it was in the interval between the bankruptcy and the appointment of assignees, when there was no one to exercise a control over the property (*f*). Relief has been refused to a judgment creditor under the old law, suing the debtor's heir at law, by whom a satisfied mortgage term and alleged fraudulent conveyance by the debtor were set up, on the ground that the plaintiff might have no interest in the property (*g*).

573. It is provided by the Lands Clauses Act (*h*), that if the promoters of the undertaking shall be desirous of entering upon and using any lands to be taken by them under the act, before any agreement, award or verdict as to the purchase-money or compensation, they may enter upon and use the lands, upon depositing in the bank the purchase-money or compensation claimed by any person interested in or entitled to sell and convey the lands, and who shall not consent to such entry; or such a sum as shall be determined by a surveyor appointed by two justices to be the value of the land or of the interest therein of the party entitled, and upon giving a bond to such party for payment of the purchase-money or compensation, with interest from the time of entry upon the land until payment or deposit of the money. A company cannot take possession of the mortgaged land, under this enactment, without providing for the interests of the mortgagee, as well

1 J. & W. 581; per Lord Hardwicke, 3 Atk. 723; per Wigram, V.-C., King *v.* Smith, 2 Hare, 243.

(*d*) Per Lord Eldon, 8 Ves. 105.

(*e*) Hampton *v.* Hodges, 8 Ves. 105; Humphreys *v.* Harrison, supra.

(*f*) See 1 J. & W. 582.

(*g*) Leake *v.* Beckett, 1 Y. & J. 339.

(*h*) 8 & 9 Vict. c. 18, s. 85.

as of the mortgagor; the former being entitled to the security of the land, and to have it protected against the acts of strangers though he has not yet obtained any right to take possession. And the mortgagee will not be bound by a valuation and other proceedings purporting to be taken under the act, but without his concurrence or service of notice of the proceedings upon him; though, if the company have so dealt with the property as to render it difficult to re-value it, they will not be allowed to insist upon a new valuation (*i*).

574. The mortgagee's right to the preservation of his security has also been asserted by an injunction, restraining the trustees of a turnpike road from reducing the tolls which formed the subject of the mortgage (*k*); and a puisne incumbrancer may be restrained, at the suit of the prior mortgagee, from taking possession of the property under the legal right acquired by an elegit (*l*).

575. When the security consists of a chattel, either the bailor or the bailee may maintain trespass in respect of it (*m*).

576. The mortgagee will be entitled, for the purposes of the security, to all accretions to the mortgaged property. If therefore the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee, of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them (*n*). And upon the discharge by the owner of the equity of redemption of a prior mortgage, a puisne mortgagee will have the full benefit of the security discharged from the prior incumbrance (*o*).

So, in the case of a mortgage of leaseholds, if a new lease or other interest of a like nature be obtained (*p*) by the mort-

(*i*) Ranken *v.* East and West India Dock Company, 12 Beav. 298. But it was held that the company could not be restrained from keeping possession. *S. C.* 14 Jur. 7; see Martin *v.* London, Chatham and Dover Railway Company, L. R., 1 Eq. 145.

(*k*) Lord Crewe *v.* Edleston, 3 Jur., N. S. 128, 1061; 1 De G. & J. 93.

(*l*) Legg *v.* Mathieson, 6 Jur., N. S. 1010; 2 Gif. 71.

(*m*) 2 Roll. Abr. 21, 22.

(*n*) Doe *d.* Gibbons *v.* Pott, 2 Dougl. 709.

(*o*) Ex parte Bisdee, 1 M., D. & De G. 333.

(*p*) Hughes *v.* Howard, 25 Beav. 575; Sims *v.* Helling, 21 L. J., N. S., Ch. 76; see Yem *v.* Edwards, 3 Jur., N. S. 462; 1 De G. & J. 598.

gagor or his representative, either on a forfeiture by any contrivance or otherwise of the original lease, or by other means, the mortgagee will have the benefit for the purpose of the security, and not the less where money was expended in obtaining the new interest.

577. The same law applies to a pledge, by which not only the thing itself, but also, as accessory, the natural increase thereof passes. Such is the case of the young of sheep born after the pledge of the flock (*q*).

578. On the other hand, if the mortgagee of a term obtain a renewal, the mortgagor shall generally have the benefit of the new term, upon redemption; because the term comes from the same root, and is subject to the same equity (*r*).

The rule of course applies with greater force where the new lease has been obtained by any improper practice (*s*). But where it was obtained, not by any contrivance or unknown to the mortgagor, nor during the possession of the mortgagee, and he had given notice that he would not redeem the lease which had been forfeited, a mortgagee was held entitled to retain the new lease (*t*).

Of the Custody and Production of the Title Deeds.

579. *Secondly*, as regards the title deeds. The mortgagee in fee of freeholds is entitled to hold the deeds (*u*), and may sue for them in trover or detinue; but a mere termor for years, whatever be the length of his term, has no right, except under a special contract, to require the delivery to him of the deeds (**937**) relating to the freehold (*x*). The right of the mortgagee of the whole estate of a tenant for life to the possession of the deeds will, of course, like that of his mort-

(*q*). Story, Bailm. § 292; Dig. xx., tit. 1, De Pignoribus, &c., xiii.

(*r*) Rakestraw *v.* Brewer, 2 P. W. 511; and see Taster *v.* Marriott, Ambl. 668; Rawe *v.* Chichester, id. 715; Owen *v.* Williams, id. 734; Lee *v.* Vernon, 5 Bro. P. C. 10; Pickering *v.* Vowles, 1 Bro. C. C. 197; Rushworth's Case, Freem. 12.

(*s*) See Fitzgerald *v.* Rainsford, 1 Ba. & Be. 37, note.

(*t*) Nesbitt *v.* Tredinnick, 1 Ba. & Be. 29.

(*u*) Austin *v.* Croome, Car. & M. 653; Harrington *v.* Price, 3 B & Ad. 170.

(*x*) Wiseman *v.* Westland, 1 Y. & J. 117; see Opie *v.* Godolphin, Pre. Ch. 548; Jenner *v.* Morris, L. R., 1 Ch. App. 603.

gagor, be subject to the right of the remainderman to have them brought into court, or otherwise secured for the benefit of the persons interested in their safe custody, and entitled to inspect them (*y*).

580. It was formerly the custom to insert in conveyances a special grant of or covenant to deliver the title deeds of the property. This has fallen into disuse, as unnecessary where the deed deals with the inheritance of the estate; and it clearly appears to be so for the purpose of giving a right to possession of the deeds, against a person who is altogether without title to hold them; as, if one who has wrongfully obtained possession of the deeds pledges them, in which case the pledgee acquires no good title against the lawful owner (*z*) (**101**).

It appears, however, that for want of a special grant of the deeds the mortgagee may lose his right to them, where they have come into possession of a person who has an interest in the estate to which they relate; as, where the purchaser of a small part of the estate took from the vendor a covenant for the production of the deeds, which were in the hands of a mortgagee of the rest of the property, and afterwards became possessed of them as assignee of the mortgage, which he again assigned without any grant of the deeds, and retained them; it was held (*a*), that the assignee could not recover them in trover, because, for want of an express grant, he could not show a better title than the assignor. And conversely, where a forged copy of a true deed was delivered to a first mortgagee, who *had* a covenant for delivery of all deeds, it was held that he might recover the true deed in detinue or trover, against a subsequent equitable mortgagee with whom it had been deposited (*b*).

The doctrine of *Yea* v. *Field* was also recognized in a modern case (*c*), in which it is said to have been laid down,

(*y*) As to which, see Sugd. V. & P. 444, ed. 14; Davidson's Conveyancing, vols. 1 and 2; Lewin on Trusts, 440, ed. 4; Garner *v.* Hannyngton, 22 Beav. 627; Jenner *v.* Morris, L. R. 1, Ch. App. 603.

(*z*) Hooper *v.* Ramsbottom, 6 Taunt. 14.

(*a*) Yea *v.* Field, 2 T. R. 708.

(*b*) Newton *v.* Beck, 3 H. & N. 220.

(*c*) Davies *v.* Vernon, 6 Q. B. 443; 8 Jur. 871.

that though the mortgagee of a term, under a security in which the deeds were expressly mentioned, having no other interest in the estate, was bound to deliver the deeds to an assignee of the mortgage, yet not having done so, and having afterwards delivered them to the mortgagors, the latter might lawfully retain them in respect of the equity of redemption, even against a subsequent mortgagee of the fee in whose security they were not expressly mentioned.

The doctrine that the wrongful delivery of the deeds by the assignor of the term, to the mortgagors, gave a right of possession, not only against the assignee of the term who was admitted to be entitled to them, but also against the subsequent mortgagee in fee, because he had not expressly contracted for them appears startling, and goes further than was necessary, having regard to the circumstances of the case.

The mortgagors were husband and wife, who mortgaged under a power of appointment, and the deeds were in the hands of a person with whom the husband, being only tenant for life of the estate, had deposited them before the date of the mortgage in fee; the depositee claiming to hold them after the husband's death against the wife, then owner in fee, subject to the mortgages.

As against the holder of the deeds, who at that time was a stranger to the estate, the owner of the equity of redemption might well have sufficient title to recover them. It seems, however, from the cases cited above, to be doubtful whether the general practice of omitting all mention of the deeds in securities relating to the inheritance is well founded.

581. If the mortgage deed be delivered by the mortgagee to another person with the object of transferring to him the debt, though the delivery be ineffectual for that purpose, the deed cannot be recovered at law by the mortgagee's executor; the transaction being treated as a gift of the document, of which the donee may avail himself as far as he can (*d*); but in equity it is treated as ineffectual, and the deed will be ordered to be delivered up (*e*).

Where the tenant for life of the mortgaged estate was

(*d*) Barton *v.* Gainer, 3 H. & N. 387. (*e*) Searle *v.* Law, 15 Sim. 95.

entitled (the mortgage being for a term) to hold the deeds, but had brought them into court for the purposes of a suit, the court refused to redeliver them without the mortgagee's consent, on the ground that he had previously taken some of them out of the jurisdiction; but Turner, L. J., thought they ought to be redelivered to the tenant for life, upon his giving security for their safe custody on the estate, and for their production and return into court if ordered (*f*).

582. The mortgagee, having acquired possession of the deeds, may retain them until actual payment or tender properly made of all that is due to him, and cannot be compelled to deliver them up on payment into court of the largest sum that can be due (*g*) (**1864**). This rule extends generally to securities in the possession of creditors, and as well to documents, upon which by the practice or custom of a profession (**273**) the holder has a lien for the value of his services (such a lien being equivalent to a special contract), as to documents expressly delivered for the purposes of security (*h*); and if documents be in the possession of persons who would be bound to produce them, as in the case of a trustee, or one of several tenants in common, the liability to production ceases when the original character of the holder is exchanged for that of a mortgagee (*i*).

"A fair mortgagee," says Lord Hardwicke, "will not deny an inspection of deeds in his hands when he has notice to be paid off" (*k*). He is however not bound to allow it, and even if the validity of the deed be disputed, or it be sought to set it aside on the mere allegation of fraud, without an allegation that the deed would disclose the fraud, and without any other special case for production being made, the mortgagee who denies notice will not be ordered to produce his security, for the inspection of a person claiming to redeem (*l*), even though

(*f*) Jenner *v.* Morris, L. R., 1 Ch. App. 603.

(*g*) Senhouse *v.* Earl, 2 Ves. 450; Sparke *v.* Montriou, 1 Y. & C. 103; Postlethwaite *v.* Blythe, 2 Sw. 256; Browne *v.* Lockhart, 10 Sim. 420; Greenwood *v.* Rothwell, 7 Beav. 293.

(*h*) Richards *v.* Platel, Cr. & Ph. 79; Mills *v.* Oddy, 6 Car. & P. 728.

(*i*) Lambert *v.* Rogers, 2 Mer. 489; Johnston *v.* Tucker, 11 Jur. 382.

(*k*) 2 Atk. 332.

(*l*) Crisp *v.* Platel, 8 Beav. 62; Dendy *v.* Cross, 11 Beav. 91; Bessford

by his answer the defendant has, for certainty, craved leave to refer to the document(*m*) when produced.

583. But a mortgage deed may be ordered to be produced, where, from admissions in the answer, the existence between the parties of the relation of solicitor and client, or other circumstances, the court considers that there is a suspicion of fraud(*n*). Thus, where a judgment creditor impeached prior securities on the ground of fraud, which was suspected because the beneficial enjoyment of the goods, which were the subject of the prior security, was in the mortgagor, though another person was said to be in legal possession, production of the prior security was ordered(*o*). So if the answer profess to set out the document of which production is required and in which the plaintiff has established an interest; or if, from the date, recitals, or other circumstances, the alleged fraud would be apparent on the very face of the instrument; showing, for instance, that a security was effected after the insolvency of the mortgagor, or by false representations of the amount due to a prior mortgagee, production will be ordered(*p*). And so, where it was alleged that inspection of the deed would show that the signature of the receipt was procured by fraud, and there was only a general denial of notice, and no denial of the particular circumstance in question(*q*); and if a mortgagee take a conveyance of the equity of redemption from a trustee, with notice of the trust, he must produce the conveyance in a suit by the *cestui que trust* for redemption, though one of the trusts was for sale(*r*).

If a mortgagee plead the Statute of Limitations(*s*) he is

v. Blakesley, 6 Beav. 131; Senhouse *v.* Earl, sup.; Perrat *v.* Balland, 2 Ch. Ca. 73, 135, 6.

(*m*) Howard *v.* Robinson, 5 Jur., N. S. 136; 4 Dr. 522.

(*n*) Gill *v.* Eyton, 7 Beav. 155; Bessford *v.* Blakesley, 6 Beav. 131; Davis *v.* Parry, 4 Jur., N. S. 431; see Patch *v.* Ward, L. R., 1 Eq. 436.

(*o*) Neate *v.* Latimer, 2 Y. & C. 257; 11 Bligh, N. S. 112; 4 Cl. & F. 570.

(*p*) Latimer *v.* Neate, 11 Bligh, N. S. 112; Neate *v.* Latimer, 4 Cl. & F. 570, explained in Glover *v.* Hall, 2 Ph. 484; Phillips *v.* Evans, 2 Y. & C. C. C. 647; and see form of order, id. 650; Hunt *v.* Elmes, 5 Jur., N. S. 645.

(*q*) Kennedy *v.* Green, 6 Sim. 6.

(*r*) Smith *v.* Barnes, L. R., 1 Eq. 65; 11 Jur., N. S. 924.

(*s*) Parkinson *v.* Chambers, 1 Kay & Jo. 72.

also in the same position, as to the liability to produce his deeds, as any other defendant who cannot shelter himself under a mortgage title.

584. But note, that to get a right to production in these cases the plaintiff must have established an interest in the deeds. A judgment creditor, therefore, impeaching for fraud, in a case of suspicion, documents which appear by the pleadings to be only mortgages, has a right to the production of a deed, the contents of which the defendant has set out in his answer, that he may see if the contents of it be truly stated; because his interest is established by the nature of the deeds (*t*).

Where no interest is shown and the liability to disclosure is contested, even the statement of the substance of the deed gives no title to production (*u*).

585. A mortgagee who admits, by his answer, that he is mortgagee of part of certain estates, without saying of what part his security consists, and who stands upon his right to refuse production, is not bound to disclose the contents of the deed, by answering further of what part he is mortgagee (*x*). And even though it be alleged that a deed has been wrongfully set up as a mortgage, the defendant may protect himself against production, by insisting on his title as mortgagee, though if he claim under another title he must produce the deed. Thus, where the suit was to set aside a conveyance of an equity of redemption, the plaintiff alleging that the deed was originally deposited by way of equitable mortgage, but had been returned on the discharge of the mortgage, after which the defendant had regained possession of it, the defendant, not claiming his privilege as a mortgagee, but denying that there had ever been a mortgage, was ordered (*y*) to produce the deed, though if he had claimed his right he would have been protected.

586. It is not a reason for ordering production against the

(*t*) Latimer *v.* Neate, 11 Bligh, N. S. 112.

(*u*) Glover *v.* Hall, 2 Ph. 484; and see Sampson *v.* Swettenham, 5 Mad. 16; Tyler *v.* Drayton, 2 Sim. & St. 309; Lloyd *v.* Wait, 10 Sim. 103.

(*x*) Addison *v.* Walker, 4 Y. & C. 447.

(*y*) Jones *v.* Jones, Kay, vi.

mortgagee or his assignee, that the assignment was made *pendente lite* for the purpose of hampering the redemption (*t*); or that by reason of a transfer of the mortgage, or of a devolution by devise, or descent of the equity of redemption, the person redeeming does not know the nature or the particulars of the deed under which the assignee claims to be entitled, or the extent of his claim: nor will the latter circumstance entitle him to have a copy of the deed even at his own cost. The assignee is bound to procure all proper parties to join in the reconveyance, and the extent and validity of his claim may be ascertained, in a foreclosure suit, by an application to the court for an account of principal and interest, under the statute 7 Geo. 2, c. 20 (*u*) (628).

587. A mortgagee is bound to produce a deed which his mortgagor was under an express or implied trust to produce; as if a lease be executed by both parties, of which there is no counterpart: for such a lease carries notice of an implied trust on the lessee's part to produce it at the lessor's request; and the lessee's mortgagees are bound also. So if the assignee of the lessor require the production of the mortgaged lease in aid of an action on the covenants (*x*).

588. No order will be made for inspection of the deeds by strangers to the suit, with whom the mortgagor is in treaty for a loan, to enable him to pay off the mortgage (*y*).

589. A person who claims a lien upon a deed has the same right as a mortgagee to refuse production (*z*); unless it be the object of the suit to impeach the deed (*a*): but the lien will not entitle him to withhold inspection from the client or those claiming under him (*b*).

590. The general rule, like other rules of abstract justice, applies to the production of title deeds of a colonial estate

(*t*) Gill *v.* Eyton, 7 Beav. 155.

(*u*) Lewis *v.* Davies, 17 Jur. 253; Browne *v.* Lockhart, 10 Sim. 420.

(*x*) Doe *d.* Morris *v.* Roe, 1 M. & W. 207; Ball *v.* Margrave, 4 Beav. 119.

(*y*) Damer *v.* Earl of Portarlington, 15 Sim. 380.

(*z*) Griffith *v.* Ricketts, 7 Hare, 303.

(*a*) Balch *v.* Symes, T. & R. 92; Fencott *v.* Clarke, 6 Sim. 8.

(*b*) Lockett *v.* Cary, 10 Jur., N. S. 144.

subject to foreign law, unless it appear that the foreign law upon the subject is different from that of England (*g*).

591. The general rule also applies where it is intended to raise the mortgage money by sale (*h*); but in an administration suit, where mortgagees had consented to a sale of the estate, and had produced the deeds for the purpose of comparison with the abstract, (which it was declared they were bound to do under the circumstances,) it was also held, that as they were to be paid off out of the purchase-money, and the transaction could not be completed until delivery of the deeds, they must bring the deeds into court: but it was ordered, that they should not be delivered out without notice to the mortgagees (*i*).

592. The mortgagee will not be ordered to produce documents pledged before the commencement of the suit, and which are out of his possession or power (*k*); but the mere statement that they have been pledged, is not inconsistent with the power to obtain production, and will therefore not be sufficient (*l*); nor, if ordered to produce, is it sufficient to say that they are not in his possession or power, when they are in the possession of his solicitor in that character (*m*): otherwise, if the solicitor holds them as the solicitor of different persons, who are not represented by the person required to produce, and the latter swears that they are not in any way in his possession or power, or under his control (*n*).

593. It has been urged that the mortgagee's right to resist production is confined to the title deeds of the estate, and does not extend to the mortgage deed itself; for that the mortgage deed itself, which puts him in the character of mortgagee, and without which he cannot resist the production of the title, must always remain open to the inspection of the mortgagor, that he may know his right to redeem (*o*). The distinction

(*g*) Bentinck *v.* Willink, 2 Hare, 1.

(*h*) Senhouse *v.* Earl, 2 Ves. 450.

(*i*) Livesey *v.* Harding, 1 Beav. 343.

(*k*) Liddell *v.* Norton, Kay, App. xi.; and see Reed *v.* Langlois, 1 Mac. & G. 627, as to the possession of agents and part owners.

(*l*) Rogers *v.* Rogers, 6 Jur. 497.

(*m*) Fenwick *v.* Reed, 1 Mer. 114; Bligh *v.* Benson, 7 Price, 205.

(*n*) Palmer *v.* Wright, 10 Beav. 234.

(*o*) 2 Ca. & Op. 53.

also seems to have been countenanced by an order, said to have been made by Lord King, C., upon motion by a mortgagor for the production of deeds generally, that the plaintiff should give the defendant a copy of the mortgage deed at the defendant's charge, but should not be obliged to produce the title deeds (*p*). And in another case, in which the distinction was relied on, an order made by the bankruptcy commissioners to commit a solicitor, who refused to produce a mortgage deed, was supported (*q*), although no reasons were given for the decision.

But the authority of the case in *Moseley* was doubted by Sir L. Shadwell, V. C. E., who refused to compel the production of the mortgage deed even to a devisee of the mortgaged estate, who was ignorant of the particulars of the security (*r*); and the supposed exception has not generally been adopted in modern practice, as appears by the numerous reported cases (*s*) concerning the production of the mortgage deed itself, which in fact is as much the title-deed of the mortgagee as any of the earlier deeds under which the property is held, and is often the only title to or evidence of his security.

The distinction, however, has lately been treated as subsisting by Stuart, V. C. (*t*), and more recently the Lords Justices (*u*), in an appeal in bankruptcy (but not without hesitation on the part of Turner, L. J., on the ground of the objection in equity to compel a mortgagee to produce his deeds) have held that the case of *Ex parte Caldecott* is an authority for ordering production of the mortgage deed in bankruptcy, under the powers given by the Bankruptcy Act, 1861, to the Court of Bankruptcy, to require the production of documents in the custody of persons concerned in dealings with the bankrupt, and which appear necessary to the full disclosure of the debtor's transactions and affairs (*x*). And

(*p*) Anon., Mos. 246.

(*q*) Ex parte Caldecott, Mont. 55.

(*r*) Browne *v.* Lockhart, 10 Sim. 421.

(*s*) See Crisp *v.* Platel, 8 Beav. 62; Dendy *v.* Cross, 11 Beav. 91; Gill *v.* Eyton, 7 id. 155; Lewis *v.* Davies, 17 Jur. 253, and others.

(*t*) Patch *v.* Ward, L. R., 1 Eq. 436.

(*u*) In re Mark's Trust, L. R., 1 Ch. App. 429.

(*x*) 24 & 25 Vict. c. 134, s. 189, following 12 & 13 Vict. c. 106, s. 120, and 6 Geo. 4, c. 16, ss. 33, 34.

that by virtue of section 197 of the same statute, that power extends to cases where the debtor has executed a registered deed of composition, although the deed contain no assignment of property, but only a covenant for payment of the debt. It appears to be established by this decision, upon the authority of *Ex parte Caldecott*, that in bankruptcy the mortgage deed will be ordered to be produced as not being within the mortgagee's privilege concerning the general title-deeds; it might otherwise have been thought to be doubtful whether a power thus given for the general purposes of the bankruptcy ought to be exercised so as to prejudice the ordinary rights of the mortgagee, or to be applied to other cases than those in which, by reason of fraud or other exceptional cause, the mortgagee would independently of the statute be ordered by a court of competent jurisdiction to produce his title-deeds (*y*).

594. The Court of Queen's Bench has also, under the act to amend the law of evidence (*z*), made an order for inspection of a memorandum of deposit by way of equitable mortgage in favour of plaintiffs claiming under the depositor of the deeds, and suing for them in detinue (*a*). The order was considered by one of the learned judges to be justified by the case of *Latimer* v. *Neate* (*b*), in which, however, the instrument ordered to be produced, and alleged to be a mortgage, had been set up by the defendant as conferring an absolute title, and was impeached for fraud (**583**).

595. An order will be made under the last-mentioned statute, for the inspection of books and documents in the possession of a person claiming a lien upon property, where reasonable ground is laid before the court for believing that

(*y*) See Ex parte Beeston, Mont. & Mac. 244, on the like provision in the statute 6 Geo. 4, c. 16, and see Ex parte Poole, 1 Ves. jun. 160, where an order on the mortgagee, whose title was affected by the bankruptcy, to deliver the deeds, was refused in bankruptcy.

(*z*) 14 & 15 Vict. c. 99, s. 6, which enables the Courts and judges of the Courts of Common Law to order inspection, where, previous to the passing of the act, discovery might have been obtained by filing a bill or other proceeding in equity at the instance of the party applying.

(*a*) Owen *v.* Nickson, 7 Jur., N. S. 497.

(*b*) 4 Cl. & Fin. 570, explained 2 Ph. 484.

the documents do not contain evidence in support of the case of the person in possession of it, but are material evidence for the person who seeks production (*c*), either in support of his original case, or of his answer to that of the other party.

596. If a mortgagee have taken a bad title, and a bill be filed against him for discovery and delivery of the deeds, the order will not extend to the mortgage deed, because he may still recover his right by means of it (*d*) (**323.**)

597. In a redemption suit, the mortgagee may be ordered to produce the deed at the hearing, for the purpose of proof; but the plaintiff will not be allowed to see it for any other purpose, or to have it left with the officer of the court (*e*). Production before the examiner for the purpose of proof may also be ordered (*f*), without prejudice to the question as to production at the hearing. And bills and notes, admitted to be in the mortgagee's possession, and constituting his evidence, and vouchers and accounts, will be ordered to be produced for inspection, either in a suit for redemption or administration, as not being within the rule concerning evidences of title (*g*).

598. The mortgagee of a remainderman who has a vested (but not of one who has only a contingent (*h*)) interest, and whose title is clear and free from reasonable cause of litigation, may sue the tenant for life for production and inspection of the title deeds; and if it be suggested that the production is required for an improper purpose, the burthen of proving the assertion lies on the person who resists the production (*i*). Inspection of chattels settled as heir-looms has been ordered against a person claiming a lien upon them under the tenant for life (**101**), on the application of the trustees of the will in a suit for delivery of the chattels (*k*).

599. In a suit by a puisne mortgagee for redemption of a prior mortgage, the plaintiff alleging that he is only surety

(*c*) Scott *v.* Walker, 2 El. & Bl. 555; 17 Jur. 916.

(*d*) Opie *v.* Godolphin, Prec. Ch. 548.

(*e*) Beaumont *v.* Foster, 5 L. J., N. S., Ch. 4; M'Comb *v.* ——, id. 2.

(*f*) Sparke *v.* Montriou, 1 Y. & C. 103.

(*g*) Gibson *v.* Hewett, 9 Beav. 293; Freeman *v.* Butler, 33 id. 289.

(*h*) Noel *v.* Ward, 1 Mad. 322.

(*i*) Davis *v.* Earl of Dysart, 20 Beav. 405; 1 Jur., N. S. 743.

(*k*) Macclesfield *v.* Davis, 3 V. & B. 16.

for the debt, is entitled to discovery from the defendant as to what securities were held by him from the alleged principal, of which the plaintiff may be entitled to the benefit (*l*) (**1461.**)

600. The mortgagor who has retained copies of the title deeds for his own purposes, and not as trustee for the mortgagee, cannot excuse himself from production on the ground of any duty towards the mortgagee (*m*); nor can he take advantage of the mortgagee's privilege, to prevent him from giving evidence of the contents of the mortgage (*n*).

601. Where there is no right in an ordinary proceeding to the production of deeds by the mortgagee, production will not be ordered upon a cross bill by the mortgagor, though an order for production will be so made in some cases, where the interests of a mortgagee are not in question (*o*).

602. A mortgagee who is ordered to produce a deed must produce every thing which depends upon it. Therefore (*p*), in a suit to set aside a conveyance of an equity of redemption, it was held that the defendant must, with the deed, produce a receipt for the mortgage money which he had obtained after the date of the conveyance.

(*l*) Bridgewater *v.* De Winton, 9 Jur., N. S. 1270.

(*m*) Hercy *v.* Ferrers, 4 Beav. 97.

(*n*) Marston *v.* Downes, 1 A. & E. 31.

(*o*) Damer *v.* Earl of Portarlington, 15 Sim. 380.

(*p*) Jones *v.* Jones, Kay, App. vi.

CHAPTER VI.

OF THE REMEDIES OF THE CREDITOR UNDER A MORTGAGE OR OTHER SECURITY.

PART 1.—OF THE GENERAL RIGHT OF THE CREDITOR TO EXERCISE HIS REMEDIES.
PART 2.—OF THE PERSONAL REMEDY AGAINST THE DEBTOR.
OF THE REMEDIES AGAINST THE SECURITY.
PART 3.—BY THE APPOINTMENT OF A RECEIVER.
PART 4.—BY TAKING POSSESSION: AND HEREIN OF THE RELATIVE RIGHTS OF THE MORTGAGOR, THE MORTGAGEE, AND THEIR TENANTS.
PART 5.—BY EXECUTION UNDER JUDGMENTS.
PART 6.—BY SALE OR FORECLOSURE.
PART 7.—BY PROOF IN BANKRUPTCY.

PART 1.—OF THE GENERAL RIGHT OF THE CREDITOR TO EXERCISE HIS REMEDIES.

603. *In what Cases the Mortgagee may Sue, and where he will be restrained from Suing.*
628. *Of staying Proceedings under the Statute 7 Geo. 2, c. 20.*
651. *Of the Persons entitled to sue for the Mortgage Debt.*
656. *Of the Time at which the Creditor may Sue, and herein of the Statute of Limitations.*
697. *Of the Evidence of the Security.*

In what Cases the Mortgagee may Sue, and where he will be restrained from Suing.

603. After the mortgage has become forfeited (*a*) by non-payment of the principal or interest (*b*), where any time has been fixed for payment; and where none has been fixed, at any time after the lending of the money, the person entitled to the mortgage debt may demand payment (*c*), and, in default

(*a*) Bonham *v.* Newcomb, 1 Vern. 232.

(*b*) Gladwyn *v.* Hitchman, 2 Vern. 134; Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Edwards *v.* Martin, 25 L. J., N. S., Ch. 284; and see Roddy *v.* Williams, 3 J. & L. 1.

(*c*) Ca. & Op. 51; Jarm. & Byth. Conv. ed. 3, vol. 6, p. 575, n.; Glanv. bk. 10, c. 8.

of payment, may proceed to exercise the special and other remedies to which, according to the nature of his security, he may be entitled against the debtor, or his assets, and the incumbered estate: and, contrary to the general rule, that a person liable to be sued is not to be harassed by a multiplicity of suits, it is the right of the mortgagee, or other secured creditor, to enforce at the same time all his legal and equitable remedies. He may at once sue on his bond, or covenant, and bring ejectment for, enter upon, and foreclose the equity of redemption of the estate, without being restrained for vexation (*d*): he may hold the pawn without sale, while suing the pawnor (*e*); and as execution against the person of the debtor is not, except under the judgment acts (1478), a satisfaction of the claim against the estate, so the possession of the latter is not a ground for discharging the execution against the person (*f*). A derivative mortgagee may even at the same time bring two different suits for redemption or foreclosure, with which the court will not interfere, though they be carried on by the same solicitor, except by making the plaintiff pay costs for the vexation (*g*). And if it be not done to accumulate expense, the mortgagee may sue for foreclosure after a decree for redemption (*h*); though it seems that if an account have been directed by consent in the redemption suit, and the plaintiff have undertaken to pay what should be found due, the mortgagee, proceeding on the undertaking, cannot avail himself of the right of foreclosure, which, according to the ordinary practice, follows default in payment (*i*).

A prior incumbrancer may also file a bill after a decree has been obtained in another suit by the owner of a puisne charge; for he is not bound to come in under that decree, at the risk of losing his rights by the suspension of the proceedings in the suit (*k*).

(*d*) Burnell *v.* Martin, Dougl. 417; Barker *v.* Smark, 3 Beav. 64; Cockell *v.* Bacon, 16 Beav. 158; Lockhart *v.* Hardy, 9 Beav. 349; Rees *v.* Parkinson, Anst. 497.

(*e*) Story, Bailm. § 315.

(*f*) Davis *v.* Battine, 2 R. & M. 76; Colby *v.* Gibson, 3 Smith, 516.

(*g*) Per Lord Hardwicke, 1 Ves. 345.

(*h*) Shepherd *v.* Titley, 2 Atk. 348; and see 4 Y. & C. 128.

(*i*) Dunstan *v.* Paterson, 2 Ph. 341.

(*k*) Arnold *v.* Bainbridge, 2 De G. F. & J. 92.

604. The mortgagee's right to enforce his securities is not confined to the institution of a suit which shall put an end to the mortgage. He may also at any time, until the arrival of the day of payment fixed in a redemption suit, file a bill to compel a conveyance to himself of the legal estate, or otherwise for the perfecting of his security; and this may be done even after an actual tender to him of the amount alleged to be due, if the proper notice of payment have not been given; and even after notice, if the sum tendered be considered insufficient, though at the peril of costs if it turn out that a proper amount was tendered (*l*).

And in such a suit, the court will not enter into the question of the amount due upon the security, unless, it seems, there be such a complete offer by the defendants to pay all that shall be found due, if the whole of the mortgagee's claim be established, as will enable the court to decree a foreclosure in case of non-payment in pursuance of the offer.

605. The mortgagee, whether his security be legal (*m*) or equitable, may also proceed generally against the assets of the deceased mortgagor. (**1455, 1779**), in which case he may (*n*), and ought (*o*), to sue on behalf of himself and all other creditors of the mortgagor; though it was formerly considered, that the conflict between his interest and that of the other creditors, was a bar to that form of suit (*p*). He may also come in and prove in an administration suit, taking a dividend on his whole debt without prejudice to his security, but not receiving in the whole more than twenty shillings in the pound (*q*). And a mortgagee has even been allowed to prove as a creditor, in a suit to administer the mortgagor's estate, after obtaining a decree of foreclosure, and contracting to sell the property; upon the terms of rescinding the contract

(*l*) Grugeon *v.* Gerard, 4 Y. & C. 119; Malone *v.* Geraghty, 3 Dru. & War. 246; 1 H. L. C. 81; see also Sperle *v.* Whayman, 24 L. J., Ch. 789; 20 Beav. 607.

(*m*) Groves *v.* Lane, 16 Jur. 854.

(*n*) King *v.* Smith, 2 Hare, 239; Skey *v.* Bennett, 2 Y. & C. C. C. 405; Brocklehurst *v.* Jessop, 7 Sim. 438; Parsons *v.* Westbrook, 5 Beav. 188.

(*o*) Blair *v.* Ormond, 1 De G. & S. 428.

(*p*) 1 Sim. & St. 362; Raikes *v.* Hall, cited 3 Y. & C. 605.

(*q*) Rhodes *v.* Moxhay, 10 W. R. 103.

and reconveying: but the proof will be limited in such a case to the amount recoverable at law on the mortgage covenant, and therefore will not include the costs of the foreclosure suit (*r*).

606. But where a mortgagee waited for fourteen years, during which the security, which was of a wasting nature, so deteriorated in value as to become insufficient for payment of the debt, he was not allowed to compel legatees under the will of the mortgagor to refund, though such of the general assets as were still otherwise available were made liable (*s*).

The mortgagee may also lose his remedy against the general assets, by refusing a tender of so much as has been found due to him under the administration decree, the fund in such a case being divided among the other creditors under the decree (*t*).

607. If the debtor become bankrupt, the secured creditor, who does not intend to rely exclusively on his security, may apply in the bankruptcy to have it realized, and to prove for the deficiency (**993**).

608. A mortgagee cannot claim the benefit of a deed of trust for the creditors of the mortgagor, unless he have either executed the deed, or have shown a clear intention to come in within a reasonable time (*u*).

609. The mortgagee of a share of a colliery has the same remedies as the mortgagor against the co-tenants of the latter, and may therefore sue them for an account; because the mortgagee has at law the absolute interest in the mortgagor's share of the land, and the co-tenant is a stranger to the right of redemption which limits the interest in equity (*x*).

610. Where the right to the equity of redemption, or, after payment of the debt, to the title deeds, is in dispute, the mortgagee may interplead (*y*). But the court will not, at the

(*r*) Haynes *v.* Haynes, 3 Jur., N. S. 504.

(*s*) Ridgway *v.* Newstead, 2 Gif. 492; 6 Jur., N. S. 1185; 7 id. 451.

(*t*) Hempstead *v.* Hempstead, 4 Beav. 423.

(*u*) Gould *v.* Robertson, 4 De G. & S. 509.

(*x*) Bentley *v.* Bates, 4 Jur. 552.

(*y*) Shotbolt *v.* Biscow, 2 Eq. Ca. Abr. 173; Roberts *v.* Bell, 3 Jur., N. S. 662, under Interpleader Act (1 & 2 Will. 4, c. 58).

instance of the mortgagee, direct inquiries to ascertain the title to the equity of redemption, where none of the persons claiming it are parties to the suit (*z*).

611. It has been said, that a mortgagee who comes into equity will never be sent to a court of law to recover as he can; because, as the redemption to which he is subject can only be worked out in equity, the whole matter will be disposed of at once under that jurisdiction (*a*). Nevertheless a mortgagee, with the legal estate, cannot sue in equity to set aside a voluntary settlement which does not touch the legal estate. His proper remedy is ejectment (*b*).

612. A mortgagee, who makes advances to trustees under a trust to raise money by mortgage or sale, is not an object of the trust, except so far as the trustees were thereby enabled to make him a good security. He has all the remedies of a mortgagee, but nothing more; and even if the trustees have power to sell after raising money by mortgage, the mortgagee cannot call upon them to exercise their power (*c*).

613. A mortgagee or other incumbrancer may sue in formâ pauperis (*d*); as may also the mortgagor: who will not be liable to be dispaupered on the ground that he has received rent from the tenants of the mortgaged estate, if it were received after notice from the mortgagee not to interfere with the property, the receipt being wrongful and an aggression on the property of another (*e*).

614. In certain cases, however, incumbrancers will not only be restrained from exercising all, or more than one, of their remedies, but even from exercising them singly. Thus the mortgagee's action of ejectment has been stayed (on security being given to redeem), on the ground of entangled accounts, where a suit for an account was also pending against the mortgagee, and it was considered beneficial to all parties to keep the possession in suspense in the meantime (*f*). And where the vendor of an estate had taken a bond for the un-

(*z*) Wetherell *v.* Garbutt, 1 Sm. & G. 124.

(*a*) 2 Ves. 268.

(*b*) Elliotson *v.* Knowles, 6 Jur. 549.

(*c*) Palk *v.* Clinton, 12 Ves. 49; and see Page *v.* Cooper, 16 Beav. 396.

(*d*) Anon., 2 Mol. 338.

(*e*) Perry *v.* Walker, 6 Jur. 846.

(*f*) Booth *v.* Booth, 2 Atk. 343.

paid purchase-money, he was ordered to elect in which court he would proceed (*g*). Also the mortgagor having a right to protection against a double account of what is due on the same mortgage, a mortgagee has been restrained from proceeding in a foreclosure suit in a colonial court, begun after a decree directing inquiries and accounts in an English suit for redemption; all the parties being in England, and the facilities for taking the accounts there being greater; but the plaintiff in the English suit was put upon terms to submit to such orders in the Colonial Court as the English Chancery should think reasonable (*h*). And so the owner of an estate subject to a charge, upon paying the amount of it with interest into court, in a suit to raise the charge, has been protected by injunction from proceedings by the mortgagee of the charge to obtain possession of the land (*i*).

615. The mortgagee has also been restrained from proceeding at law on his collateral security, where the title deeds being out of his power, he was unable effectually to re-convey the estate; the amount due being directed to be ascertained and paid into the bank, there to remain until the title deeds could be secured, and a reconveyance had (*k*). And he will in like manner be restrained if having sold the estate (though he sold it fairly) for less than was due, or having transferred the mortgage without the collateral securities, he afterwards proceed to sue the mortgagor on the latter (*l*). So if he join with the purchaser of the equity of redemption in a sale, and allow him to receive the purchase monies, the mortgagee being no longer able to re-convey the estate, will not be allowed to sue the mortgagor for the amount so allowed to be received (*m*).

616. The same equity under which the mortgagee is restrained from suing, where he cannot restore the mortgagor to his full rights, will be exercised against a person with whom

(*g*) Barker *v.* Smark, 3 Beav. 64.

(*h*) Beckford *v.* Kemble, 1 Sim. & St. 7.

(*i*) Duncombe *v.* Greenacre, 6 Jur., N. S. 987; 7 id. 175.

(*k*) Schoole *v.* Sall, 1 Sch. & Lef. 176.

(*l*) Lockhart *v.* Hardy, 9 Beav. 349; Walker *v.* Jones, L. R., 1 P. C. 50.

(*m*) Palmer *v.* Hendrie, 27 Beav. 349; 28 id. 341.

the mortgagee has dealt for the purpose of defeating the mortgagor's remedies. Therefore, where a vendor who was liable to an action at the suit of a purchaser, on the covenant for quiet enjoyment, paid off the purchaser's mortgagee, and procured him to acknowledge that the covenant was satisfied; the vendor was restrained from setting up the mortgage or the acknowledgment in bar of the action; because upon payment of the money the mortgagor was entitled to the benefit of the covenant, and the act of the vendor was contrary to equity and good conscience (*n*).

617. The Court of Chancery will restrain the incumbrancer from exercising a power of sale in a security which was made ultra vires, or in the irregular or improper exercise of a power (*o*) (**904**). And from proceeding on a security which is tainted with suspicion of fraud, on payment of the money secured by it into court; and on this ground has stayed proceedings in the Admiralty Court on a bottomry bond. It is not necessary for this purpose to make out a case which will at all events entitle the plaintiff to relief, it being sufficient to show that it is a proper subject of investigation in a court of equity (*p*). But it is said that a defendant to a foreclosure suit cannot impeach the security for fraud without instituting a cross suit (*q*). And a suit by the mortgagor to set aside a mortgage as invalid, without any offer to redeem so far as the same may be valid, will fail if the security be valid in any respect, and cannot be turned into a redemption bill (*r*).

618. The mortgagee will also be restrained from doing acts in disregard of the rights of persons, subject to whose contracts with the mortgagor he has taken his security; and therefore from so dealing with a ship, as to prevent the performance of a charter-party of which he had notice (*s*) (**868**);

(*n*) Thornton *v.* Court, 3 De G., M. & G. 293.

(*o*) Southampton Boat Company *v.* Pinnock; Same *v.* Muntz; Same *v.* Rawlins, 9 L. T., N. S. 748, 749; 12 W. R. 330, 331.

(*p*) Glascott *v.* Lang, 8 Sim. 358; 3 M. & C. 451; Dobson *v.* Lyall, 3 M. & C. 453, n.

(*q*) Per Turner, L. J., in Eddleston *v.* Collins, 3 De G., M. & G. 1; Jacobs *v.* Richards, 18 Beav. 300; see Vorley *v.* Cooke, 1 Gif. 230; 4 Jur., N. S. 3.

(*r*) Cranver, &c., Mining Company *v.* Willyams, 35 Bea. 353.

(*s*) De Mattos *v.* Gibson, 4 De G. & J. 276; 5 Jur., N. S. 555.

but if the mortgagor cannot put the ship into a condition to perform the contract, and the charterer have neglected to take steps to compel its performance, the mortgagee will no longer be prevented from exercising his rights.

619. He will be compelled to respect rights which have been acquired by third persons from the mortgagor since the date of the security, if he have done acts which amount to an acknowledgment of such rights, or if the security were taken with the knowledge that the granting of such rights was incident to the purposes to which the estate was devoted (*t*). And he will not be allowed to cause unnecessary injury to the estate, as by cutting timber, when the security is not shown to be sufficient (*u*) (**572**).

620. Although the trustee of property belonging to a public body, being a mortgagee of the same property under an instrument made in pursuance and for the purposes of the trust, will not be restrained from exercising his rights as mortgagee, and in so doing from using the property in a manner opposed to the trusts under which he acts (*x*), where the general public are not interested under a statute in the performance of such trusts, yet where the security consists of a railway, canal or other work in the maintenance of which the general public are interested (**406**), under the statute which authorized its construction, the mortgagee or judgment creditor is not allowed to foreclose or to sell the undertaking, or the land or works, or to take possession under an elegit or otherwise than by means of a receiver, or to use any other remedy against the land which will interfere with the public right to the continued use of the undertaking, or with the powers which the company alone are authorized to exercise; and although the judgment creditor is entitled to issue execution against the rolling stock and other chattels of the company (*y*), yet if his judgment be founded upon a debt due

(*t*) Mold *v.* Wheatcroft, 27 Beav. 510; Moreland *v.* Richardson, 24 id. 33; see Powell *v.* Aiken, 4 K. & J. 343.

(*u*) Withrington *v.* Banks, Sel. Ca. in Ch. 30.

(*x*) Attorney-General *v.* Hardy, 1 Sim., N. S. 338.

(*y*) Furness *v.* Caterham Railway Company, 25 Beav. 615; 27 id. 358; Potts *v.* Warwick Canal Company, Kay, 142; see Gardner *v.* London,

on a mortgage debenture, as the holder of which he is entitled only to be paid pari passu with the holders of other debentures issued by the company, he will be treated in respect of his execution as a trustee for the other debenture creditors; and where a receiver had already been appointed in the suit, an inquiry was directed whether it would be for the benefit of the other debenture creditors that the receiver should take proceedings to render the judgment available for their benefit (*z*). No execution, attachment or other process against the property of a railway company will be available without leave of the Court of Chancery, after notice published in the London or Dublin Gazette of the filing in the court of a scheme of arrangement between a company unable to meet their engagements and their creditors; the assent in writing to which scheme by three-fourths in value of the holders of the mortgages or bonds issued under the authority of the company's special acts, and by three-fourths in value of the holders of debenture stock of the company, will be deemed to be the assent of all the holders of such mortgages, bonds and debenture stock respectively; and a like proportion in value of the holders of mortgages, bonds and debenture stock of a leasing company will, so far as relates to such creditors, bind that company; but the assent of such creditors will be unnecessary where their interests will not be prejudicially affected by the scheme (*a*).

Chatham and Dover Railway Company, L. R., 2 Ch. App. 201; Russell *v.* East Anglian Railway Company, 3 Mac. & G. 104; Wickham *v.* New Brunswick, &c. Railway Company, L. R., 1 P. C. 64; Doe *d.* Myatt *v.* St. Helen's, &c. Ry. Co., 2 Q. B. 374. Even this right has been temporarily taken from creditors of railway companies, the whole or part of whose railways are open for public traffic. Their plant and chattel property cannot be taken in execution at law or in equity from the passing of the act (20th August, 1867), to the 1st September, 1868, on a judgment recovered in an action on a contract made after the passing of the act; but the judgment creditor may obtain a receiver, and, if necessary, a manager, on petition to the Court of Chancery; and the receiver, after providing for the working expenses and other outgoings, is to apply the receipts in payment of the debts of the company according to the rights and priorities of the creditors. (Railway Companies Act, 1867, s. 4.)

(*z*) Bowen *v.* Brecon Railway Company, L. R., 3 Eq. 541.

(*a*) Railway Companies Act, 1867 (30 & 31 Vict. c. 127, ss. 9, 10, 14, 15).

621. The mortgagee may also be prevented from using his remedies if he have neglected to furnish a proper account, and have refused a proper and sufficient tender (*b*); and he may lose his rights by laches against a later incumbrancer without notice, whom he suffers to enter and retain possession of the estate for many years, without requiring any payment on account of his security, or any admission of title (*c*).

622. When an advowson is the subject of the security, the quare impedit of the mortgagee will be restrained, upon the mortgagor's offer to redeem; and the court will compel the resignation of the mortgagee's and the presentation of the mortgagor's nominee; because the mortgagee, although he be in possession, cannot legally make any profit of the right of presentation (*d*).

623. Again, if the plaintiff in a redemption suit have made out a primâ facie title to redeem, as by showing that he is an incumbrancer on the estate, the court, without determining in what rank he stands, or who are the other persons entitled to redeem or foreclose, will upon motion in the cause restrain the first mortgagee from transferring or assigning the mortgage security, and from conveying or otherwise dealing with the legal estate in the hereditaments comprised in the security, until the rights of the parties can be settled, upon the principle of protecting the security pending the litigation; but it will not interfere with the possession of the deeds (*e*). And the court will take this course the more readily if the first mortgagee have contracted to deal with the estate by surprise, or have shown an intention to deprive the puisne mortgagee of his rights; as where the agreement for sale was made after the filing of the bill to redeem, no objection

(*b*) Herries *v.* Griffiths, 2 W. R. 72.

(*c*) Searle *v.* Colt, 1 Y. & C. C. C. 36.

(*d*) Galby *v.* Selby, 1 Str. 403; Robinson *v.* Jago, Bunb. 130; Amhurst *v.* Dawling, 2 Vern. 400; Jory *v.* Cox, Pre. Ch. 71; Mackenzie *v.* Robinson, 3 Atk. 559; see Gardiner *v.* Griffith, 2 P. Wms. 403. But according to Dickens, Lord Thurlow, in such a case, directed an account of what was due on the mortgage, and payment by a short day, with injunction in the meantime; and, on the report, liberty to apply. (Dyer *v.* Lord Craven, 1 Dick. 662.)

(*e*) Rhodes *v.* Buckland, 16 Beav. 212; James *v.* Biou, 3 Sw. 234.

having been made to the right to redeem till the six months' notice of payment had nearly expired. A sale by the mortgagee for an improper object will also be restrained (*g*).

624. The mortgagee will not be restrained from selling, upon the application of an incumbrancer claiming to restrain him from doing so, by virtue of a contract which he is at the same time impeaching. As where the assignee of a puisne mortgagee, whose assignor was privy to a transaction by which the first mortgagee's rights were admitted, had filed a bill to impeach those rights, and attempted to stop the sale, on the ground that by the same transaction the first mortgagee had limited his power of sale (*h*).

625. Nor will the court interfere with the mortgagee's action on his covenant, on the ground that a contract still incomplete has been made by him to sell the estate for a larger sum than is due on the mortgage (*i*): nor with his ejectment, because, after contracting to sell, he has brought an action on the covenant, and has compromised it on payment of a sum by another person whom the original mortgagee afterwards redeemed for the purpose of completing his contract for sale (*k*); nor are his rights affected by his agreement to purchase another estate from the mortgagor, and to deduct the mortgage debt from the purchase-money (*l*).

626. The provisions which restrain the judgment creditor, who has obtained a charging-order (*m*), from taking any proceedings to obtain the benefit of it till the expiration of six calendar months from the date of the order (**154**), does not prevent him from getting a stop-order within that period to restrain payment of the dividends (*n*). The order only prevents the security from being diminished, by restraining

(*g*) Whitworth *v.* Rhodes, 20 L. J., N. S., Ch. 105.

(*h*) Cockell *v.* Bacon, 16 Beav. 158.

(*i*) Willes *v.* Levett, 1 De G. & S. 392; but the report is not very clear. The prayer was to restrain the sale as well as the action, and the common injunction was granted in that form, and was dissolved. But the Vice-Chancellor's observations appear only to refer to the action.

(*k*) Davies *v.* Williams, 7 Jur. 663.

(*l*) Pell *v.* Stephens, Coop. t. Brougham, 266.

(*m*) 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1.

(*n*) Watts *v.* Jefferyes, 3 Mac. & G. 372.

the payment of a part of the fund which it was intended by the statute should be impounded for the benefit of the creditor.

The same principle is applied to the provision contained in 1 & 2 Vict. c. 110 (*o*) (135), which restrains the judgment creditor from proceeding in equity to obtain the benefit of his charge, until after the expiration of a year from the entering up of his judgment.

627. The creditor is only restrained from proceeding to obtain the benefit of the charge, not from doing what is necessary to prevent the loss of the benefit; or from using all rights which he has acquired by virtue of the charge, when completed by possession under the execution. Therefore (*p*) a creditor, who has a charge upon a life interest, may have the income impounded in equity during the year, in order that after its expiration he may not lose the fruit of his charge by the failure of the subject of it. Being also entitled to proceed, either under the statute or independently of it, provided he has done what he can to obtain at law the benefit of his judgment, he may, if he have issued an elegit, come into equity within the year for protection of the property, even if in the case of leaseholds he may not be relieved without the elegit, as upon a wasting security (*q*). And when in possession under an execution, he may sue in equity for the redemption of a mortgage which his judgment entitles him to redeem (*r*).

Where a bill is filed by a judgment creditor, upon which he can have no relief, because the year limited by the act has not expired, and no elegit has been sued out, he cannot cure the defect by amending the bill after the end of the year, or by setting up a title as mortgagee, which was acquired after the filing of the bill, though he may be relieved in a supplemental suit (*s*)

(*o*) Sect. 13.

(*p*) Yescombe *v.* Landor, 28 Beav. 80.

(*q*) Partridge *v.* Foster, 10 Jur., N. S. 741.

(*r*) Barnes *v.* Thrupp, 3 Jur., N. S. 1242.

(*s*) Smith *v.* Hurst, 10 Hare, 80; Godfrey *v.* Tucker, 9 Jur., N. S. 1188; 33 Beav. 280; 33 L. J., Ch. 559.

Of staying Proceedings under the Statute 7 Geo. 2, c. 20.

628. It has also been provided by statute (*t*), that where any action shall be brought on any bond (630) for payment of a mortgage debt, or performance of mortgage covenants, or where any action of ejectment shall be brought in any court of record at Westminster, or in the Court of Great Sessions in Wales, or in any of the superior courts in the counties palatine of Chester, Lancaster or Durham, by any mortgagee or his representative or assignee, for recovery of the possession of any mortgaged hereditaments; and no suit shall be then depending in any court of equity in England for the foreclosing or redeeming of such mortgaged hereditaments, if the person having right to redeem such mortgaged hereditaments, and who shall appear and become defendant in such action (635), shall, pending such action, pay to the mortgagee, or in case of his refusal shall bring into court (631) where such action shall be depending, all the principal monies and interest due on such mortgage, and also all costs expended in any suit or suits at law or in equity upon such mortgage (such principal, interest and costs to be computed by the court where such action shall be depending, or by the proper officer by such court to be appointed for that purpose), the monies so paid or brought into court shall be taken to be in full satisfaction and discharge of such mortgage; and the court (637) shall and may discharge every such mortgagor or defendant from the same accordingly, and by rule of the same court compel such mortgagee, at the costs of such mortgagor, to assign, surrender or re-convey the mortgaged hereditaments and the mortgagee's estate and interest therein, and deliver up all deeds, evidences and writings (*u*) relating to the title of the mortgaged hereditaments unto the mortgagor who shall have paid or brought such monies into court, his heirs, executors or administrators, or such other person or persons as he or they shall for that purpose appoint.

(*t*) 7 Geo. 2, c. 20, s. 1. The provisions of sect. 1, so far as they relate to actions of ejectment by mortgagees, have been re-enacted in almost similar words by the Common Law Procedure Act, 1852, s. 219.

(*u*) See Anon., 2 Ch. Pr. Ca. 264.

629. It is also provided (*x*) (**648**), that when any suit shall be brought in equity to compel the defendant or defendants, having or claiming a right to redeem, to pay the principal and interest due, or the principal and interest together with any monies due on any incumbrance or specialty chargeable on the equity of redemption, and in default of payment for foreclosure, the court on an application (**638**) by the defendant or defendants having a right to redeem, and on his or their admitting (**639**) the title of the plaintiff, may, at any time before bringing the cause to a hearing, make such decree as it might have made in case the suit had been regularly brought to a hearing; and all parties shall be bound by such decree, as if it had been made by the court at or after the hearing of the suit. But the act does not extend (*y*) to any case in which the person against whom the redemption is prayed shall insist in writing (**633**), before the money is brought into court, that the party praying redemption has no right to redeem (**645**), or that the premises are chargeable with other principal sums than those appearing on the face of the mortgage, or admitted to be due; nor to any case where the right of redemption is controverted between different defendants in the same suit, nor to the prejudice of any subsequent mortgagee or incumbrancer.

630. It was usual, at the time of the passing of this act, to secure the payment of the mortgage debt, and the performance of the covenants contained in the mortgage deed, by means of a bond, which is alone specified in the beginning of the first section as the subject of an action; but the word *bond* being treated in its broad sense as an obligation, the statute is applied also to actions upon the covenant in the mortgage deed (*z*).

631. The mortgagor must bring into court all that by construction is due on the mortgage. Relief was refused on pay-

(*x*) 7 Geo. 2, c. 20, s. 2.

(*y*) Sect. 3. See the corresponding enactment as to actions of ejectment in sect. 220 of the Common Law Procedure Act, 1852, by which the person against whom redemption is prayed may insist in writing to the like effect under his hand or the hand of his attorney, agent or solicitor, to be delivered before the money shall be brought into Court, to the attorney or solicitor for the other side.

(*z*) Dixon *v.* Wigram, 2 Cr. & J. 613; Smeeton *v.* Collier, 1 Exch. 457.

ment only of interest and costs, where the mortgagee had power to enter and pay himself principal and interest on default of payment of interest; because on such default the principal was held to be immediately payable, notwithstanding a clause which postponed the payment of it for a term of years (*a*).

632. Where there are more mortgages than one, a court of law will not, under the statute, allow redemption on payment of the principal, interest and costs on one mortgage only (*b*) (**1239**), or on payment of what is due on the mortgage, where other monies may be tacked (*c*); but will not, in addition to the mortgage debt, compel payment of bond or simple contract debts (*d*), which cannot be tacked to the mortgage, except against the heir (**1218**); nor of other monies not secured by the mortgage, as interest due before its date, or the costs of preparing the mortgage (**1728**), or of an assignment of it (*e*): which latter, indeed, are not, as of course, allowed to the mortgagee, even by courts of equity, which are not fettered by the language of the first section of this statute. And where the mortgagee claimed the costs of an abortive attempt to sell the estate, it was held by the Court of Exchequer (*f*), that the object of the statute being to relieve the mortgagor from the delay and expense of a suit in equity for redemption, and not to lessen the rights of the mortgagee, and there being no provision for accounts in the case of a mortgagee in possession, the application of the statute was altogether limited to cases in which it would be equitable to relieve on payment only of principal, interest and costs of suit; viz. where the mortgagee is not in possession, and has not attempted to exercise the power of sale.

633. Under the third section of the act, if the person against whom the redemption is prayed shall deny the right to redeem, or shall insist that the premises are chargeable

(*a*) Goodtitle *d.* Green *v.* Notitle, 11 Moore, 491.

(*b*) Roe *d.* Kaye *v.* Soley, 2 W. Bl. 726.

(*c*) Felton *v.* Ash, Barnes, 177; see Goodright *v.* Moore, Barnes, 176.

(*d*) Bingham *v.* Gregg, Barnes, 182; Archer *v.* Snatt, 2 Str. 1107.

(*e*) Doe *d.* Blagg *v.* Steel, 1 Dowl. P. C. 359.

(*f*) Sutton *v.* Rawlings, 3 Exch. 407.

with other sums, he must not content himself by giving a simple notice to that effect, but must state such facts as will enable the court to form an opinion as to the ground upon which the right is disputed (*g*), or the nature and amount of any further demand which may be claimed by the mortgagee, beyond the principal, interest and costs, both because the court is bound to see the nature of the question raised and the reality of the demand, and because, in the latter case, the defendant cannot otherwise be expected to admit its validity (*h*) (**645**). If the mortgagee claim interest during the interval between the granting of the rule to stay proceedings and the actual payment of the money, he must also claim it at the time of discussing the rule (*i*).

634. The court cannot order the mortgagee to pay the costs of the rule, on the ground that he refused a tender of the amount due (*k*); nor will any claim for costs incurred at law be allowed on a proceeding in equity under the statute, unless, as is necessary where the cause comes to a regular hearing, the claim be raised by the bill (*l*).

635. Unless the mortgagor himself have appeared, and become defendant in an action of ejectment (**628**), the court cannot interfere (*m*), either under its statutory or its general power, over the action; it is not sufficient that the actual defendant, at the time of the application, is the authorized agent of the mortgagor (*n*). So, if the mortgagee have obtained possession in an undefended action of ejectment, possession cannot be restored to the mortgagor under the statute on payment of principal, interest and costs (*o*). But where the recovery was against the mortgagor's tenant, the court was prepared to set aside the judgment and to let in the mortgagor to defend as landlord, that he might be able to apply to stay proceedings under the terms of the statute.

(*g*) Doe *d.* Harrison *v.* Lench, 18 L. J., Q. B. 278; 14 Jur. 853; 6 Dowl. & L. 270, notwithstanding Filbee *v.* Hopkins, id. 264.

(*h*) Goodtitle *d.* Leon *v.* Lonsdown, Anst. 937.

(*i*) Jordan *v.* Chewas, 8 Dowl. P. C. 709.

(*k*) Doe *d.* Simpson *v.* Bunn, 1 W. W. & H. 49.

(*l*) Millard *v.* Magor, 3 Mad. 433.

(*m*) Doe *d.* Orchard *v.* Clifton, 6 Nev. & M. 857; *S. C.* Doe *d.* Hurst *v.* Clifton, 4 A. & E. 814.

(*n*) Doe *d.* Orchard *v.* Clifton, supra.

(*o*) Doe *d.* Tubb *v.* Roe, 4 Taunt. 886.

636. The mortgagor is sufficiently shown, for the purposes of the statute, to be a defendant, if he swear that he has entered the usual appearance, though he omit to state that he has entered into a consent rule; if there be no evidence that he has omitted to do so (*p*).

637. The power given in general terms to the courts of common law, by this statute, to order the delivery of deeds, may be exercised by a judge at chambers (*q*).

638. The application in equity under the statute may be made either by petition or motion, upon the hearing of which the court will, in a proper case, make a decretal order, directing (*r*) an account of the principal and interest due, and taxation of the plaintiff's costs, and that on payment within six months of the amount found due, the plaintiff do re-convey; but in default of payment that the defendant be foreclosed, with the usual directions.

639. The admission of the plaintiff's title required by the statute, as a foundation for the application, is such that the defendant cannot dispute (*s*) the amount of principal stated by the bill to be due; nor can evidence be admitted that payments have been made in reduction of principal, notwithstanding a statement to that effect in the petition. And it was said (*t*) by Lord Redesdale, then Solicitor-General, that if the defendant applied before answer, he must take the statement of the bill to be true; but that the court made no order where the plaintiff was aware of the objection but had not admitted it and offered an issue.

The defendant must submit not only to the demand, but also to the relief prayed by the bill, and to which the plaintiff would be entitled at the hearing; and he cannot have an order for an account, and that on payment within six months the mortgagee may reconvey, and that proceedings may be stayed in the meantime, without the order for foreclosure in default (*u*).

(*p*) Doe *d.* Cox *v.* Brown, 6 Dowl. P. C. 471; Doe *d.* Simpson *v.* Brown, 2 Jur. 841.

(*q*) Smeeton *v.* Collier, 1 Exch. 457.

(*r*) 2 Van Heythuysen, 390.

(*s*) Huson *v.* Hewson, 4 Ves. 105.

(*t*) Id. 106.

(*u*) Praed *v.* Hull, 1 Sim. & St. 331.

640. All the defendants who have a right to redeem are required by the act to join in the application, and admit (to which not denying by the answer does not amount) (*x*) the plaintiff's title; therefore it was said, that the assignees of a bankrupt mortgagor, whose bankruptcy happened after the commencement of the suit, could not have an order without the bankrupt's concurrence, because the decree would give him a right to redeem (*y*). Also there can be no order, because there can be no admission, where one of the defendants is an infant (*z*).

Nor will the court generally make a decretal order against infant defendants (**1844**), under its inherent powers (**648**), to the same effect as an order under the statute, where the plaintiffs would thereby be enabled to foreclose the infant's estate (*a*); although the mere fact that the infants are parties to the suit as *cestuis que trust*, where their interests are subject to the paramount right of a consenting defendant (such as the right of an administrator to deal with the assets which are the subject of the mortgage), will not prevent the court from making the order (*b*).

641. An objection having been made by a plaintiff, whose bill contained the usual suggestion that the defendant had dealt with the equity of redemption, that a discovery of subsequent incumbrances was necessary for the safety of the title by forclosure, leave was given to the defendant to produce an affidavit upon the subject (*c*); and the necessity for the discovery appears from the fact, that the defendant had actually sold the estate. But in a latter case (*d*), Shadwell, V. C. E., held, that no such affidavit was necessary.

642. The statute does not leave the court without discretion, so as to compel it, contrary to its usual practice, to relieve a person in contempt (*e*).

643. It seems that simple foreclosure suits only are con-

(*x*) Roe *v.* Wardle, 3 Y. & C. 70.

(*y*) Garth *v.* Thomas, 2 Sim. & St. 188.

(*z*) Lushington *v.* Price, 9 Sim. 651.

(*a*) Taylor *v.* Coates, 3 Hare, 263.

(*b*) Id. and Grane *v.* Mitchell, 10 Sim. 484.

(*c*) Piggin *v.* Cheetham, 2 Hare, 80.

(*d*) Reeves *v.* Glastonbury Canal Company, 14 Sim. 351.

(*e*) Howitt *v.* M'Cartney, 13 Ves. 560.

templated, and not those in which another demand is set up independent of the foreclosure, though Lord Eldon thought that a reference might justly be made as to the mortgage, and that the cause should go on as to the other matters (*f*). And relief is said to have been refused in equity, where the mortgagee sought to tack other demands to his mortgage (*g*).

644. It is clear that the statute does not apply to a suit in which a sale is prayed (*h*); but in such a suit, the court, under its general powers, will direct an account of the principal, interest and costs found due (*i*).

645. The provisions of the third section of the act appear to be satisfied by the production of affidavits, showing an actual ground for disputing the right to redeem; as for instance that the mortgagor had agreed in writing to sell the equity of redemption to the mortgagee (*k*); and it has been laid down that the act was intended to apply only where the right to redeem was clear beyond all doubt (*l*).

646. Where the mortgagee has proceeded at law, it is indispensable that an application under the statute be made, if at all, before he is entitled to take out execution (*m*); the reason, it is presumed, being, that the mortgagee is not to be deprived or delayed in taking advantage of the fruit of his diligence; the statute not being for his prejudice, but for the benefit of the mortgagor. But this consideration does not prevent the court from enlarging the time for payment on the usual terms under a statutory order, the matter being treated, under the latter words of the second section, as if the cause had been regularly brought to a hearing (*n*).

(*f*) Bastard *v.* Clarke, 7 Ves. 489.

(*g*) Vaughan *v.* Lloyd, cited 7 Ves. 489.

(*h*) Praed *v.* Hull, 1 Sim. & St. 331.

(*i*) Aberdeen *v.* Chitty, 3 Y. & C. 382.

(*k*) Goodtitle *d.* Tatum *v.* Pope, 7 T. R. 185; but an application in similar circumstances under 4 Ann. c. 16 (which provides for the discharge of debts on bonds subject to defeasance, where the money shall have been brought into court, or paid before action, though not strictly according to the condition, ss. 12, 13), was granted, after deliberation, on the ground that no suit in equity had been brought for the performance of the contract. (Skinner *v.* Stacey, 1 Wils. 80.)

(*l*) Per Alexander, C. B., Goodtitle *v.* Bishop, 1 Y. & J. 344.

(*m*) Amis *v.* Lloyd, 3 V. & B. 15.

(*n*) Wakrell *v.* Delight, 9 Ves. 36; Coop. 27.

647. The order made under the statute is a decree, and therefore cannot be discharged on motion (*o*).

648. It is said (*p*), that the object of this statute was merely to give a new jurisdiction, in the case of mortgages, to courts of law; the second section, as to courts of equity, being merely incidental and unnecessary: because there was always in those courts an inherent jurisdiction to stay the proceedings in any cause, and in any stage of the cause, whenever the defendant will submit to a decree, establishing the full demand made by the bill, and giving the whole relief prayed in respect of that demand with costs.

The court will accordingly stay proceedings, under its inherent powers, upon payment or tender by a *puisné* incumbrancer of the principal, interest and costs of the plaintiff, and upon bringing into court a sum sufficient to cover the costs of the defendant, so far as the plaintiff is liable to them, until the amount has been ascertained. And the other defendants cannot resist the motion on the ground of hardship upon them, in dismissing a suit by which they hoped to get their rights, and for the prosecution of which they relied upon the plaintiff: because, up to the time of the decree, the defendants have no control over the suit, the plaintiff being *dominus litis*, and being besides always liable to be paid off. But the court will refuse to make such an order, where it would affect the interests of the other defendants, by interfering with questions as to the priorities of the incumbrances on the estate; or with an order of the court made in another suit relating to the same securities; though even in such a case it will anticipate the decree at the hearing by ordering inquiries as to the priorities of, and the amounts due to, the incumbrancers, and if proper by directing a sale (*q*).

In another case in equity (*r*), a motion for reconveyance and stay of proceedings in a suit by a *puisné* incumbrancer, against the mortgagor and other mortgagees for foreclosure,

(*o*) Cadle *v.* Fowle, 1 Bro. C. C. 516. Paynter *v.* Carew, Kay, xxxvi.

(*p*) Praed *v.* Hull, 1 Sim. & St. 331; Boys *v.* Ford, 4 Mad. 40; Damer *v.* Earl of Portarlington, 2 Ph. 30; 10 Jur. 673; see form of order there,

(*q*) Paine *v.* Edwards, 8 Jur., N. S. 1201.

(*r*) Lastett *v.* Cliffe, 5 Jur. 403.

was granted on payment into court by the defendant of enough to cover the principal and interest due to the plaintiff, and the costs of him and the other mortgagees, defendants to the suit, as between solicitor and client. A rule at law (*s*) for reconveyance and delivery of the deeds by a first mortgagee, who had received notice from a second mortgagee not to part with them, seems more open to question, considering the duties of a first mortgagee in such a position; but it was said that several modes might be adopted to prevent injury to the second mortgagee through the interference of the court.

649. Where the circumstances of the case prevent the court from making an order under the statute, it will sometimes make such a decree under its inherent powers, as it might have made at the hearing (*t*); viz. for account and foreclosure, in default of payment on a given day; and it appears by reported cases (*u*), that the court has even stayed proceedings on payment, on or before a certain day, without giving the plaintiff his right of foreclosure on default of payment at that day; but with a proviso, that on such default it should be deemed that no order had been made on the application. This, however, seems hardly to meet the rights of the mortgagee, who is undoubtedly entitled to proceed upon all his remedies, without being stopped or delayed otherwise than by payment of all that is due (**603**). And Sir W. P. Wood, V. C., has refused (*x*), where no tender or payment has been made, to make any order to stay proceedings which would give the plaintiff less than the decree of foreclosure on default of payment at the day named; refusing also to make a decree of absolute foreclosure on default, where there were many defendants, because a partial decree against one defendant only ought not to be made. The inference therefore seems to be, that where no payment or tender has been made, and there are several defendants entitled to redeem, and not consenting to the application, the court ought not to make an

(*s*) Dixon *v.* Wigram, 2 Cr. & J. 613.

(*t*) See Aberdeen *v.* Chitty, 3 Y. & C. 382, where a sale was ordered.

(*u*) Jones *v.* Tinney, Kay, xlv.; Challie *v.* Gwynne, Kay, xlvi.

(*x*) Paynter *v.* Carew, Kay, xxxvi.

order under its own powers, on the application of one of such defendants, staying proceedings on payment at a given day, with foreclosure on default against the defendant seeking the order.

650. Under its general powers, and upon considerations of policy or convenience, the court will also stay proceedings in suits, independently of any submission to the demand made by the bill. Thus, where a plaintiff had already filed two harassing bills for redemption, which were dismissed, the proceedings in a third suit, commenced for the same purpose, were stayed (*y*) until payment of the former costs. And the court has stayed a suit for redemption, against an ambassador, for a year and a day, unless he should sooner return from his embassy (*z*); upon the principle that he is entitled, as a public officer, to be protected against suits during his absence. And to the same effect, says Lord Coke (*a*), that, "as to the king's soldier, and the king's ambassador, both these being for the publique good of the realme, private transactions and suites must be suspended for a convenient time."

Of the Persons entitled to sue for the Mortgage Debt.

651. It was formerly considered, that, although where there was a collateral security by bond or covenant for the mortgage debt, it belonged to the personal representative of the mortgagee; yet that if there were no such security, nor any want of assets, and the condition of a mortgage in fee was for payment to the heir or executor, the heir might become entitled to the land, as real estate absolutely vested in the mortgagee (*b*). But it was soon after adjudged, and has

(*y*) Calvert *v.* Routh, 4 Y. & C. 514. As to applications at law to stay proceedings on forfeiture of a bond by non payment of interest, see 4 Ann. c. 16, s. 13; Darby *v.* Wilkins, 2 Str. 957; Van Sandau *v.* ——, 1 B. & Ald. 214; Wheelhouse *v.* Ladbrooke, 3 H. & N. 291.

(*z*) Pilkington *v.* Stanhope, 2 Vern. 317.

(*a*) Co. Litt. 130 a.

(*b*) St. John *v.* Grabham, 11 Car. 1, cited 2 Ch. Ca. 88. At law the old rules were, that if the money were merely made payable to the feoffee, it should be paid on his death to his executor; except that if only a partial payment were made, and fraudulently accepted by the executor, the estate should not be divested out of the heir. (Lit. 339; Co. Lit. 209 b.) That if the condition were to pay to the mortgagee or his heirs, the latter should receive it, because they were appointed by the parties themselves; if to the feoffee, his heirs or assigns, the pay-

ever since been held, that in all mortgages the money must go to the executor or administrator and not to the heir of the mortgagee, unless the latter in his lifetime (*c*), or by his will (*d*), do otherwise dispose thereof. And this doctrine rests on the ground that the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; as soon as the mortgagor pays the money, the land belongs to him, and the money only to the mortgagee. And the question of assets or no assets, or the existence or want of a personal security, was declared to be no measure of justice to the personal representative, but only a pretence to favour the heir (*e*). Nor is the entry by the mortgagee an act which makes the mortgage part of his real estate (*f*).

652. The heir of the mortgagee is, therefore, before foreclosure, or release of the equity of redemption, only a trustee for the mortgagee's executors, and if the mortgagor himself be the heir of the mortgagee, the legal estate will not pass to the devisee of the mortgagor, under a general devise of real estates in trust for sale (*g*); for to hold the contrary would be to assume that the mortgagor had authorized his devisee to make a sale, which would be a direct breach of trust.

But, where the heir of the mortgagee obtained a decree of foreclosure, and after the day of payment had passed, the mortgagor discovered that the money had been given to the executor, and filed an original bill, praying liberty to pay the money to him, it was held (*h*), that the plaintiff was for ever

ment must be to the heirs, and not to the executors, who are not assigns at law of the estate, because the mortgagee, being seised of the estate, could make assigns by deed; and if under the last form of condition the feoffee assigned over, the payment might be made either to the first feoffee or his heirs, or to the second feoffee, the feoffor not being bound to take notice of the second feoffment, and the first feoffee and his heirs being expressly named in the condition. (Co. Lit. 210 a.) But a covinous payment would not defeat the heir of the second feoffee. (Goodall *v.* Wyet, Cro. Eliz. 383; Moor, 708.)

(*c*) Cotton *v.* Iles, 1 Vern. 271.

(*d*) Noys *v.* Mordaunt, 2 Vern. 581.

(*e*) Smith *v.* Smoult, 2 Ch. Ca. 88; Thornborough *v.* Baker, 1 Ch. Ca. 283; 3 Sw. 628; Meeker *v.* Tanton, 2 Ch. Ca. 29; Winn *v.* Littleton, 1 Vern. 3; Tabor *v.* Grover, 2 Id. 367; Canning *v.* Hicks, 1 Vern. 412.

(*f*) Noy *v.* Ellis, 2 Ch. Ca. 220.

(*g*) Ex parte Marshall, 9 Sim. 555.

(*h*) Earl of Carlisle *v.* Globe, Freem. Ch. R. 148; differently cited, 2 Vern. 67.

foreclosed; but it was ordered that the heir should sell the land, and the executor should have the value. The purchase-money was ordered into court, till the heir and executor had interpleaded, and the mortgagor was discharged from payment to the latter. In another case (*i*), Jefferies, L. C., is reported to have said that the heir might, if he would, keep the land, and take the benefit of foreclosure, on payment of the debt to the executor. It is, therefore, too late, as it seems, for the mortgagor to complain, after decree, that he has been foreclosed by the wrong party.

653. After a release of the equity of redemption, or absolute foreclosure, the estate being no longer a mere security (**1880**), will pass to the heir or devisee (*k*). And even though the foreclosure be incomplete, if the estate be devised as realty, it will be so as between the devisor and the devisee (*l*); and upon an enlargement of time for redemption (**1789**), the latter would seem to be entitled to the money; for it is plain, that whether the gift have the quality of money or land, the devisee may equally have been the object of the mortgagee's bounty. But, as against creditors, the incomplete foreclosure does not prevent the security from remaining personal assets for payment of the mortgagee's debts (*l*); not does it seem proper, that if the estate have descended after the order absolute for foreclosure has been obtained by the mortgagee, and the foreclosure be afterwards opened on the ground of fraud, collusion, or irregularity of process, the heir should be entitled to the redemption money, because under such circumstances he could hardly have any equity against the mortgagee's personalty; but if the foreclosure be opened for a reason which does not touch the honesty or regularity of the transaction, the heir would no doubt be entitled to the money: and even in cases of fraud, if he lost the estate, he would be entitled to the value of improvements (**1612**).

654. The estate will not be treated as realty in the hands of the mortgagee, where there as been no foreclosure, on the

(*i*) Clerkson *v.* Bowyer, 2 Vern. 66.
(*k*) Thompson *v.* Grant, 4 Mad. 438.
(*l*) Garrett *v.* Evers, Mos. 364.

ground that at the filing of the bill an absolute title has been acquired by possession, under the Statute of Limitations; if, at the date of the accruer of the right which is claimed by the bill, there was clearly only a mortgage title (*m*).

655. The mortgagee may sue the assignees of the bankrupt mortgagor for foreclosure (*n*). The real and personal estate of the bankrupt now vests in the assignees by virtue of their appointment (*o*), but even when a conveyance was necessary for this purpose, the assignees might be foreclosed before its execution; and it seems that if the bill had been dismissed as against them, the assignees would have acquired a new right by the conveyance, which would have defeated the mortgagee's estate (*p*).

Of the Time at which the Creditor may sue, and herein of the Statute of Limitations.

656. There will be no foreclosure until default in payment, according to the agreement (*q*) (**603**); but as the right of redemption may be postponed, during a certain period (**488**), so the mortgagee's right to call in the money, and consequently to foreclose or sell may also be limited (*r*); and the limitation may be greater than that upon the right to redeem; for the same reason does not exist for guarding the rights of the mortgagee as of the mortgagor. There is, therefore, no objection to an agreement that the debt shall not be called in during the lifetime of any particular person; and unless fraud were proved, it is probable that no objection would be made to any postponement of the right.

657. If there be an absolute covenant not to call in the money, during a certain period, no default in payment of interest during that period will enable the mortgagee to sue, notwithstanding the breach of the condition in the mortgage; though if there be no such covenant, the mortgagee can sue at any time after default in payment of interest, however dis-

(*m*) Flack *v.* Longmate, 8 Beav. 420.
(*n*) Bainbridge *v.* Pinhorn, Buck, 135.
(*o*) 12 & 13 Vict. c. 106, ss. 141, 142; and see 24 & 25 Vict. c. 134, s. 117.
(*p*) Bainbridge *v.* Pinhorn, supra.
(*q*) Bonham *v.* Newcomb, 1 Vern. 232.
(*r*) Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Ramsbottom *v.* Wallis, Coote, App. 580.

tant may be the day at which payment of the principal money is reserved (*s*), unless he have waived the default by afterwards accepting the interest (*t*).

Such a covenant also affects the right to sue in respect of any monies, to which the mortgagee becomes entitled in that character; and even of salvage claims (as for advances of head rent) during the period included in the covenant (*u*), but not in respect of injuries to the security (*x*).

Neither can a *puisné* mortgagee, who has covenanted not to foreclose during a certain time, proceed to redeem the first mortgagee, and to get a conveyance of the legal estate (*y*), for he has no right to sue the mortgagor, or to bring him before the court, because of the covenant, and without the mortgagor the first mortgagee cannot be sued.

658. A solicitor cannot enforce a charge upon his client's estate for costs by suit, pending the taxation of the costs. A bill or claim for such a purpose will be dismissed with costs, without prejudice to future proceedings after completion of the taxation; but it seems that if the suit be only to establish the charge, it may be ordered to stand over until the taxation be completed (*z*).

659. It had been decided (*a*), that sect. 40 of the statute 3 & 4 Will. 4, c. 27 (which enacts, that no action, suit, or other proceeding, shall be brought to recover any sum of money secured by mortgage, judgment or lien, or otherwise charged upon (*b*), or payable out of any land or rent, at law or in equity, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, or within twenty years after some part of the principal or interest money (**677**) shall have been paid, or some acknowledg-

(*s*) Burrowes *v.* Molloy, 2 Jo. & Lat. 521; Stanhope *v.* Manners, 2 Ed. 196.

(*t*) Langridge *v.* Payne, 2 J. & H. 423. See In re Taafe, 14 Ir. Ch. R. 347.

(*u*) Burrowes *v.* Molloy, supra.

(*x*) Dugdale *v.* Robertson, 3 Jur. (N. S.) 687.

(*y*) Ramsbottom *v.* Wallis, Coote, Mort. App. 580.

(*z*) Waugh *v.* Waddell, 16 Beav. 521.

(*a*) Dearman *v.* Wyche, 9 Sim. 570; Henry *v.* Smith, 2 Dru. & War. 387; and see 2 Hare, 334.

(*b*) This does not include bond debts, by which the heir is bound. (Roddam *v.* Morley, 2 Kay & J. 336. See *S. C.* 1 De G. & J. 1; 3 Jur. (N. S.) 449.)

ment of the right thereto shall have been given, in writing, to the person entitled thereto or his agent, signed by the person by whom the same shall be payable, or his agent), might be pleaded to a bill to foreclose an equity of redemption; because, it was said, the substantial object of the suit is the recovery of the money, although, in form, the bill only seeks the exclusion of the equity of redemption. But, upon considering (*c*), that the statute provides distinct remedies (or, more correctly, makes distinct regulations) for the recovery of the estate and of the money, and that, although the suit may lead to payment of the money, the payment is in the option of the defendant and cannot be enforced against him, it was afterwards determined that the right to file a bill of foreclosure is not affected by the 40th sect. of the statute 3 & 4 Will. 4, c. 27, but falls within sect. 24 of that act and the act 1 Vict. c. 28. The first of these provides, that no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the same act, he might have made an entry, or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity: viz., twenty years (*d*) next after the accruer of the right to make the entry or distress, or to sue, to the plaintiff, or to some person through whom he claims. And it being doubtful whether this or another section (which declares that where the claimant shall have become entitled, by forfeiture or breach of condition, the right shall be deemed to have accrued when the forfeiture is incurred or the condition broken (*d*)) was intended to apply to the case of a mortgagee (*e*), so as to compel him to sue within twenty years from the day of default, it was enacted by 1 Vict. c. 28, that any person claiming under any mortgage of land may make an entry or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage; though more than twenty years

(*c*) Wrixon *v.* Vize, 3 Dru. & War. 104.

(*d*) Sect. 3, et seq.

(*e*) See 5 Ad. & E. 297.

may have elapsed since the right to make the entry, or to bring the action or suit, shall have first accrued.

660. A mortgagee who does not come to the court as a plaintiff to enforce his rights, but is made a defendant by a creditor to complete a purchaser's title and procure the distribution of funds set apart to indemnify him against the charge, is not bound by the statute (*f*).

661. The purchaser of a mortgaged estate, to whom both the mortgagor and mortgagee convey, is a person claiming under a mortgage within the latter act, although the mortgage no longer exists; and time runs under 3 & 4 Will. 4, c. 27, from the payment of the mortgage debt and interest (*g*).

662. The assignee of a mortgage, made more than twenty years before the action, but on which the mortgagor had paid interest within twenty years, was held to have a right of entry under 7 Will. 4 & 1 Vict. c. 28, against a defendant who had been in possession by the mortgagor's sufferance without paying rent, or making acknowledgment, for a period commencing more than a year before the date of the mortgage; though the mortgagor's right, which accrued before the mortgage, was barred by time under 3 & 4 Will. 4, c. 27 (*h*).

663. The act of 3 & 4 Will. 4, c. 27, also declares (*i*), that when any acknowledgment of the title of the person entitled to any land or rent, shall have been given to him or his agent in writing signed by the person in possession or receipt of the profits or rent, such possession or receipt, of the person giving the acknowledgment, is deemed to have been the possession or receipt of or by the person to whom it is given, at the time of giving the same; and the right of the latter person to sue is deemed to have accrued at, and not before, the time of giving the acknowledgment, or the last of the acknowledgments, if more than one (**680**).

Where the possession was not adverse at the passing of the act, the right was not barred till five years from that date (*k*).

(*f*) Murphy *v.* Sterne, 1 Dr. & Wal. 236.

(*g*) Doe *d.* Baddeley *v.* Massey, 17 Q. B. Rep. 373.

(*h*) Doe *d.* Palmer *v.* Eyre, 17 Q. B. Rep. 366; Ford *v.* Ager, 2 H. & C. 279; 7 Jur. (N. S.) 804.

(*i*) Sect. 14.

(*k*) Sect. 15.

664. An allowance of ten years is made for persons under disability, and their representatives, from the termination of the disability, or from death (*l*) (**506, 688**). No action can be brought by any person under disability when his right first accrued, but within forty years next after the accruer of the right, though such disability may have lasted during the whole of that period, or though the term of ten years from the cessation of any such disability shall not have expired (*m*); and where a person under disability at the accruer of the right shall die during the disability (*n*), no time to sue beyond the twenty years next after the accruer of the right, or the ten years next after the death of the person under disability, shall be allowed by reason of the disability of any other person.

665. Although section 24 of 3 & 4 Will. 4, c. 27, is so framed as to exclude legal mortgages, according to the letter of the act (for it speaks of the mortgagee's right to sue, as if he *had been* entitled at law), it is held (*o*), upon the plain intention of the act, and upon the terms of the act of Victoria, that legal securities are also included.

Where a mortgage, executed only by the mortgagor, conveyed the legal estate at once to the mortgagee, and there was a covenant for quiet enjoyment *after* default, but no intention was shown that the mortgagor should enjoy the land, between the execution of the deed, and default in payment of the money; it was held (*p*), that the covenant meant only that, *before* default, the mortgagee should rest upon his own title as against strangers; and time was held to run against the mortgagee from the date of the mortgage, and not from the day of default in payment.

666. The word "judgment," as used in the 40th section of the act of Will. 4, is not confined, in its meaning, to cases in which judgments can only be enforced against real estate, on account of the nature of the debtor's assets, but it applies (*q*) also to cases in which personalty is subject to the judgment.

(*l*) Sect. 16.
(*m*) Sect. 17.
(*n*) Sect. 18.
(*o*) Wrixon *v.* Vize, 3 Dru. & War. 104, 118.
(*p*) Doe *v.* Lightfoot, 8 M. & W. 553.
(*q*) Watson *v.* Birch, 15 Sim. 523.

667. The limitation created by the statute applies equally, whether the interest mortgaged be reversionary or not; a mortgage of a reversionary interest being subject (so far as its nature admits) to the same rules of law as any other security (*r*).

668. Before the passing of the statute 3 & 4 Will. 4, c. 27, it was held (*s*), that, although a creditor's demand were in strictness barred by the rule of equity, used by analogy to the old Statute of Limitations, yet that rule would not be applied against him, if it appeared that he had delayed his suit in confidence of the prosecution of an existing suit, by another creditor, on behalf of himself and other creditors; because every creditor has an inchoate right in such a suit, to the extent of its being considered as a demand. After the passing of the statute (sect. 40), a case occurred (*t*), in which it was determined that where a creditor, knowing nothing of the prosecution of a former suit, comes to the court after discovering that suit, and after the statute has otherwise barred his remedy, and claims payment out of a fund in court in the former suit, he shall have no relief; because the statute makes no exception in favour of a bill filed by one creditor for the benefit of the rest. But the question was left open, whether, if the creditor's suit were prosecuted with the knowledge and consent of him who afterwards claimed the benefit of it, and who had trusted to its prosecution, it would not so far be his suit that the statute would be inapplicable; and it was observed, that if the statute could be held not to apply, the creditor must give good reasons why he delayed to seek in his own person the help of the court. And, subject probably to that observation, it seems, that the law remains as it was before the statute; and that a creditor may come (*u*) in under

(*r*) Sinclair *v.* Jackson, 17 Beav. 405; Humble *v.* Humble, 24 Beav. 535; 3 Jur., N. S. 1289.

(*s*) Sterndale *v.* Hankinson, 1 Sim. 393. The doctrine is far too broadly stated in the margin of the report. See the judgment, and see the case explained, 1 Y. & C. 438.

(*t*) Berrington *v.* Evans, 1 Y. & C. 434; followed in O'Kelly *v.* Bodkin, 3 Ir. Eq. R. 390; Hutchins *v.* O'Sullivan, 11 Ir. Eq. R. 443.

(*u*) Bermingham *v.* Burke, 2 Jo. & Lat. 699; the learned author of which decision also states, that the case of Sterndale *v.* Hankinson is still law, both in England and Ireland, but to be cautiously applied since the statute. (Sugd. R. P. S. 123.)

another creditor's bill for the general benefit of creditors, filed or prosecuted with his knowledge before the decree to account and report made, where his demand would not have been barred had he himself filed the bill, and where he comes in according to the decree and the course of the court (*x*). For it is thought to be but reasonable, where creditors come in under a decree in such a suit, to suppose that they were lying by, seeing that there was a suit in progress of which they could have the benefit, and it is impolitic to make a rule which would drive each creditor to begin a separate suit, or action, to recover his particular demand.

669. It is immaterial that the bill does not profess to be filed on behalf of creditors, that being but a matter of form; if the suit be so constituted as to admit of a creditor coming in under the decree and proving his demand, the want of that averment will not shut him out (*y*). A mortgagee's suit (*z*) for sale of the estate, not purporting to be on behalf of all the creditors, and a decree therein after the mortgagor's death directing accounts of his estate, is only contingently for the benefit of creditors, who have no present right to go in and prove under the decree.

The benefit of a suit cannot be claimed under this rule, against the statute, by a person who, although made a party to the suit, was not served and did not appear, and whose name was afterwards struck out (*a*).

670. In a case (*b*) in England since the statute, in which a bill was filed by a creditor on his own behalf only, making another creditor, who claimed a lien for a debt on certain papers, a defendant, and praying the usual accounts and administration, and that the lien claimed, *if any*, might be ascertained, and the amount paid according to priority; it was held, that this was not a suit of which the person claiming the lien could have the benefit as a creditor, against the

(*x*) See O'Kelly *v.* Bodkin, 3 Ir. Eq. R. 390; Brown *v.* Lynch, 4 Ir. Eq. R. 316.

(*y*) O'Kelly *v.* Bodkin, 2 Ir. Eq. R. 369; and see Bennett *v.* Bernard, 12 Ir. Eq. R. 229. And the observations there upon Sterndale *v.* Hankinson, supra..

(*z*) Rankin *v.* Harwood, 2 Ph. 22.

(*a*) O'Kelly *v.* Bodkin, 3 Ir. Eq. R. 390.

(*b*) Watson *v.* Birch, 15 Sim. 523.

Statute of Limitations; because, so far from his lien having been admitted, the bill prayed that the lien, if any, might be ascertained; and upon a petition by the claimant of the lien, praying an inquiry as to the amount due thereon, the court only directed a general inquiry as to incumbrancers; so that the claimant was nowhere treated as a creditor in the decree or otherwise in the proceedings, except in the Master's report, by which his debt was found to be due. This decision is doubted by a great authority (*c*), but stands, it is submitted, upon good reason. The prayer, that the lien, *if any*, might be ascertained, was certainly not an admission of the existence of the lien. It is like an offer to discharge a lien if it should be established, which does not bind if the lien be not established (*d*); and, in like manner, admission to an estate, subject to an equity of redemption, *if any*, is no acknowledgment of a mortgage title (*e*). Nor could the fact, that the debt was found due by the Master's report, amount to a recognition of its existence, for no inquiry was directed as to the particular debt; and it was this very report which was in question, and was alleged to be wrong, by reason that the debt had been barred by the statute.

671. The vendor's right to recover the purchase-money of real estate, which right falls within sect. 40 of the statute, is not saved by the existence of a suit by the creditors of the devisor, under whose will the sale took place, for the administration of his estate; nor by administration suits by the residuary devisees and legatees of the purchaser (*f*).

672. So long as the mortgagee is alone in receipt of the rents of the mortgaged estate, as if he be tenant for life of the estate, the statute does not run against the mortgage title; the interest is deemed to have been paid out of the rents in favour of the remainderman, who cannot allege that it was not paid for the purpose of setting up the statute. But it seems the court cannot assume that the interest was paid if the bill expressly state that the rents were insufficient for

(c) Sugd. R. P. S. 120.
(*d*) Pelly *v.* Wathen, 7 Hare, 352.
(*e*) Hardy *v.* Reeves, 4 Ves. 466; and see Bligh *v.* Benson, 7 Price, 205.
(*f*) Toft *v.* Stephenson, 7 Hare, 1; see on App. S. C. 1 De G., M. & G. 28.

the purpose (*g*). The rule seems to be the same where the incumbrancer is tenant in common of the estate; for tenant in common is entitled to redeem the whole estate, as against an incumbrancer, and, subject to account with his co-tenant, he is entitled to receive the whole rent (*h*) (**526**).

673. Where tenant for life pays off a charge, though he take no steps for keeping it alive, it remains unmerged in favour of his personal representatives, notwithstanding the Statute of Limitations and the absence of part payment or acknowledgment; there being no assignable person liable to pay the charge, or who by the delay could be induced to suppose that the charge was merged; and the rent, out of which the interest was payable, being receivable by and belonging to the person entitled to the interest (*i*).

674. The appointment by the court of a receiver (**718**) of the encumbered estate does not prevent time from running against a stranger to the suit; but it does prevent it, in a court of equity, from running in his favour against the suitor; for the possession of the court is the suitor's possession, and against a person in possession time cannot run (*k*).

675. Where money, which is liable for the payment of unsatisfied claims, has been paid over to persons as volunteers, in breach of trust, the statute does not bar the creditor's claim as against those persons, but an account may be directed of the monies paid to them (*l*).

676. The possession of the mortgagor is consistent with and not adverse to the rights of the mortgagee, except in case of renunciation of his rights by the latter, or under other special circumstances (*m*). But time runs under the Statute of Limitations against the mortgagee, although there be no adverse possession (*n*).

(*g*) Wynne *v.* Styan, 2 Ph. 303; Lord Carbery *v.* Preston, 13 Ir. Eq. R. 455.

(*h*) Wynne *v.* Styan, 2 Ph. 303.

(*i*) Burrell *v.* Earl of Egremont, 7 Beav. 205.

(*k*) Harrison *v.* Duignan, 2 Dru. & War. 295; Wrixon *v.* Vize, 3 id. 104; Dixon *v.* Gayfere, 17 Beav. 421.

(*l*) Fordham *v.* Wallis, 10 Hare, 231; 17 Jur. 228.

(*m*) Doe *v.* Williams, 5 A. & E. 291; 6 Nev. & M. 816.

(*n*) Wrixon *v.* Vize, 3 Dru. & War. 104, 121.

677. The operation of the statute 3 & 4 Will. 4, c. 27, s. 40, is prevented by payment of some part of the principal money, or some interest thereon, or by some acknowledgment of the right thereto given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; no action, suit or proceeding being allowed within twenty years after such payment or acknowledgment, or the last of them, if more than one.

In 3 & 4 Will. 4, c. 42, which provides (sect. 3), that all actions of covenant or debt, upon any bond or other specialty, or of debt upon any bond, or *scire facias* upon any recognizance, shall be commenced within twenty years after the cause of such action or suit, the saving clause (sect. 5) provides that if any acknowledgment shall have been made either by writing signed by *the party liable,* by virtue of the indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon, it shall be lawful for the person or persons entitled to such actions, to sue within twenty years after the acknowledgment, part payment, or part satisfaction, or within twenty years after the cessation of any disability.

Under the statute of James 1 (*n*), which did not provide for acknowledgment by part payment, a payment out of personal estate would not keep alive a debt against realty which was also liable to pay it (*o*); for, except in cases of joint contract, one person cannot generally be bound by the admissions of another (*p*). Upon the same principle and authority, it was held, under the modern statute, that payment of interest by the devisee of the mortgagor, or receipt of rent by a creditor, in his character of incumbrancer on the real estate, ought not to preserve the debt against the debtor's personalty (*q*).

678. It was, however, held before the passing of the statute 3 & 4 Will. 4, that if an equitable mortgagee enter into possession and receive the rents of the estate, the receipt ought

(*n*) 21 Jac. 1, c. 16.
(*o*) Putnam *v.* Bates, 3 Russ. 188.
(*p*) Atkins *v.* Tredgold, 2 B. & C. 23; Slater *v.* Lawson, 1 B. & Ad. 396.
(*q*) Fordham *v.* Wallis, 10 Hare, 217; 17 Jur. 228.

primâ facie to be taken as part payment of interest or principal, as the case may be (*r*); and it has been considered (*s*), that such a receipt or other part payment of the mortgage debt will keep alive against the statute the judgment or bond debt, by which the mortgage is collaterally secured. And although it has been determined under 3 & 4 Will. 4, c. 42, that the payment of interest by one devisee, upon whose estate a moiety of the testator's debts was charged, will not keep alive the remedy against the devisee under the same will of another estate, charged with the other moiety of the debts (*t*): yet as the words "the party liable" used in that statute must mean each or any of the persons liable, where there are more than one, the acknowledgment or payment by any one of several persons liable for the same debt, in respect of interests in the same estate, will preserve the remedy against the others. The payment therefore by a devisee for life, of interest on the testator's specialty debt for which the heirs are bound, will keep alive the right of action against the remainderman (*u*), and so will payment by devisees in trust, under a will, against the beneficial devisee (*x*).

679. As to the nature of the acknowledgment required by sects. 40 and 42 of the statute, the latter of which clauses relates to arrears of rent and interest, it has been held (*y*) (and the principles of the decisions apply also to sect. 28) (**503**), that the admission must have been made to the person entitled to make the demand [or his agent], and with a view, on the part of the person acknowledging, of making himself liable to the demand. Therefore a letter written by an executor, seeking to throw the burden of the debt upon another person, was held not to be within the statute. But an admission made by answer or other proceeding in a suit will be a good acknowledgment to the person entitled, if he be a party,

(*r*) Brocklehurst *v.* Jessop, 7 Sim. 438.

(*s*) Sugd. R. P. S. 128, and cases cited there; Dowling *v.* Ford, 11 M. & W. 329.

(*t*) Dickinson *v.* Teasdale, 1 De G., J. & S. 57; 9 Jur., N. S. 236.

(*u*) Roddam *v.* Morley, 1 De G. & J. 1; and see In re The Fitzmaurices, 15 Ir. Ch. R. 445.

(*x*) Coope *v.* Cresswell, L. R., 2 Eq. 106.

(*y*) Holland *v.* Clark, 1 Y. & C. C. C. 151.

though not the plaintiff in the suit (*z*); but where he is not a party, it seems to be otherwise (*a*). The Master's report, however, being a judicial document, and he deriving his authority from the court, and not being the agent of the parties, has been held to be no acknowledgment within the statute of a judgment debt; especially as the person entitled to the debt was no party to the suit: though it has been thought (*b*), that the report itself, the debtor being a party to it, would give a new right to receive the money secured by the judgment, just as if the judgment itself had been revived.

680. The acknowledgment under these sections is to be made by the person by whom the money is payable, or his agent; in which respect they differ from sect. 28, under which no acknowledgment by an agent is valid (**502**). In the case of an equitable lien, the person by whom the money is payable is understood to be the person claiming the land out of which the money is payable (*c*).

681. The payment on account of an annuity, of the dividends of a sum of stock which has been set apart to answer the annuity, is not a payment which, under sect. 40, will bar the annuitant from recovering the arrears. To create such a bar, there must have been no recognition of the annuity (*d*).

682. Where by a consent order in a foreclosure suit, in which the Statute of Limitations had been set up, a payment was made to the plaintiff in part discharge of his claim, it was held, that though the payment would have defeated the bar created by the statute as between adults, the rights of infants who were parties to the suit were not affected (*e*).

683. The words "the person by whom the same shall be payable, used in sect. 40 (and which apply there both to the making of a payment and the signing an acknowledgment (*f*)), have been applied to the mortgagor, so as to make payments of interest by his agent sufficient to prevent the statute from

(*z*) Blair *v.* Nugent, 3 Jo. & Lat. 658; 677.

(*a*) Hill *v.* Stawell, 2 Jebb. & S. 389.

(*b*) Sugd. R. P. S. 131.

(*c*) Toft *v.* Stephenson, 1 De G., M. & G. 28; 15 Jur. 1187.

(*d*) In re Ashwell's Will, Joh. 112.

(*e*) Thwaites *v.* M'Donough, 2 Ir. Eq. R. 97.

(*f*) Chinnery *v.* Evans, 11 H. L. C. 115.

barring the demand of the mortgagee, as to estates included in his security, but which had been sold many years before by the mortgagor; and to the rents of which no recourse had been had for payment of interest (*f*). This decision appears at first sight to conflict with the construction put upon nearly similar words in 3 & 4 Will. 4, c. 42 (**1676**), by which the acknowledgment of the mortgagor was held to be unavailing to support the claim of the first mortgagee, to arrears of interest beyond the period limited by the statute, and to the detriment of puisné incumbrancers (*g*).

In the case of *Bolding* v. *Lane* the acknowledgment relied on did not (as was supposed by the learned judge who decided that case in the Court of Chancery, and who also took part in the decision of *Chinnery* v. *Evans*), consist of payment of interest by the mortgagor, but arose from a recital in a transfer of a puisné mortgage; though this circumstance has only a remote bearing upon the distinction between the cases: in each of which the rights of persons taking, subject to the first mortgage, were involved. In the one, the mortgagor's acknowledgment was, and, in the other, it was not, held sufficient to affect them. But if the decisions had been otherwise, the rights which the puisné incumbrancers had acquired in the latter case, by the neglect of the first mortgagee to obtain his interest, would have been taken from them for his benefit; whereas, in the former, the first incumbrancer, who was in no default, would have been deprived of his right in favour of persons who always held subject to it. The principle which reconciles the decisions appears to require that to make the acknowledgment sufficient under the statute, it must not only bind the person who makes it, but must not affect the existing rights of any other person in the estate, whether such rights were acquired by the original contract, or by the operation of the statute itself.

684. It seems clear that payment of interest by a stranger (**1393**) would not be an acknowledgment within sect. 40 (*h*):

(*f*) Chinnery *v.* Evans, 11 H. L. C. 115.

(*g*) Bolding *v.* Lane, 1 De G., J. & S. 122; 9 Jur., N. S. 506.

(*h*) Chinnery *v.* Evans, 11 H. L. C. 115.

but the heirs of the mortgagor have been held to be bound, by payments of interest made by a person, whose length of possession, if she were treated as a stranger, and not as the agent of the heirs, would be sufficient to bar their own right (*i*).

685. The acknowledgment must show that the debt is subsisting; a mere recital that a mortgage of the property has been executed, and that the latter is still vested in the mortgagee, is not sufficient: for the mortgagee may be in possession, and yet may have satisfied himself out of the rents (*k*).

686. The acknowledgment will be sufficient, if it be made by a trustee of the estate, whether he be a devisee in trust (*l*) of the debtor, or a trustee appointed by the court (*m*); just as the acknowledgment of an executor will keep alive a debt against all parties beneficially interested. And a letter (*n*), professedly written and signed by an amanuensis for the person acknowledging, and sworn to have been written according to his dictation, and to have been signed in his presence, has been held to be a good acknowledgment by an agent; though the agency might probably be established on less particular, though substantial, proof.

Where an acknowledgment is made by a person who fills a double character, as that of executor and beneficial devisee of the debtor, it is a general acknowledgment, and will not be applied to one character more than to the other, and the interest of the person making it as beneficial devisee will be affected (*o*); but if he be executor of one debtor, and be also a debtor individually, in respect of the same debt, an act done by him which he was bound to do in his individual character, and which amounts to an acknowledgment, will not be *primâ facie* considered to have been done as executor (*p*). He fills the place of two persons, and the question is, by whom the promise was made, and not what is the extent or effect of it.

(*i*) Ames *v.* Mannering, 26 Beav. 583.

(*k*) Howcutt *v.* Bonser, 3 Exch. 491.

(*l*) St. John *v.* Boughton, 9 Sim. 219.

(*m*) Toft *v.* Stephenson, 1 De G., M. & G. 28; 15 Jur. 1187.

(*n*) St. John *v.* Boughton, supra.

(*o*) Fordham *v.* Wallis, 10 Hare, 231; 17 Jur. 228.

(*p*) Way *v.* Basset, 5 Hare, 55.

687. An undisturbed possession for twenty years by the grantor of an annuity, and his representatives, of land charged with payment of the annuity, during which time the annuity has been punctually paid, but no written acknowledgment has been given, has been held (*q*) not to operate as a bar to the annuitant, though it seems to have been thought that the literal construction of the statute might have led to such a consequence: and, *à fortiori*, a mortgagee will not be barred by the punctual payment of his interest under the like circumstances (*r*).

688. The disabilities referred to in the act of Will. 4 (s. 16) are in substance, and nearly in words, the same as those in the act of James 1st, viz. infancy, coverture, idiotcy, lunacy, unsoundness of mind and absence beyond seas. But the last was not under the old statute any disability, where the absent person had absconded to avoid or retard justice (*s*); and this rule seems to be required by public policy.

The right to sue must have accrued during the disability, and the act gives no new equity in respect of a subsequent disability (*t*). So under the old law, if time began to run during the life of the ancestor, it continued against the infant heir (*u*); and, running during a woman's discoverture, would continue after her marriage (*x*).

Where disability is relied on as an excuse for not coming to the court, the disability must be clearly stated. It is not enough to say generally, that there have been infancies, coverture or other disabilities, owing to which the plaintiff during part of the time has been unable to assert or prosecute his right (*y*). This was held under the old law in a case of redemption.

689. In a case (*z*) which came before him when Lord Chancellor of Ireland, Lord St. Leonards declined to give

(*q*) Francis *v.* Grover, 5 Hare, 39.
(*r*) Sugd. R. P. S. 27, 29.
(*s*) Jenner *v.* Tracy, 3 P. W. 287, note.
(*t*) Goodall *v.* Skarratt, 3 Drew. 216.
(*u*) St. John *v.* Turner, 2 Vern. 418.
(*x*) Anon., 2 Atk. 333.
(*y*) Blewitt *v.* Thomas, 2 Ves. jun. 669.
(*z*) Law *v.* Bagwell, 4 D. & W. 398; and see Dillon *v.* Cruise, 3 Ir. Eq. R. 81.

any opinion on the question whether the 25th sect. of 3 & 4 Will. 4, c. 27 (which provides that where any land or rent shall be vested in a trustee, upon any express trust, time shall run against the right of the *cestui que trust*, or those claiming through him, to sue the trustee or those claiming through him, to recover such land or rent, only from the time when the trust estate shall have been conveyed to a purchaser for valuable consideration, and then only as against such purchaser and any person claiming through him), applies to the 40th and 42nd sections of the same act; and he thought the difficulty might be greater as to the latter section. But the Vice-Chancellor of England had already held (*a*), that sect. 40 had no operation where the relation of trustee and *cestui que trust* existed; and Lord St. Leonards himself, sitting in the full Court of Appeal in Chancery, has since held (*b*), with the concurrence of the Lords Justices, that the *cestui que trust* of an annuity, secured by a subsisting term in trustees, is entitled, notwithstanding section 42, to the whole arrears, so long as the trustees have the right to get possession by virtue of the legal estate vested in them. Upon the existence of which right also depends the decision in the case of *Young* v. *Lord Waterpark*. It will be observed, that the 24th section, to which by its position the 25th appears intended to be specially pointed, relates to the recovery of land or rent, but the 40th and 42nd to money and arrears, and interest of money, charged upon land or rent.

690. The 25th section applies to cestuis que trust *inter se* where some have received to the exclusion of others, as well as between them and the trustee; its operation being to except where there is an express trust all cases which would otherwise have fallen within the general rule contained in sect. 24 (*c*).

(*a*) Young *v.* Lord Waterpark, 13 Sim. 204; 15 L. J. (Ch.) N. S. 63.

(*b*) Cox *v.* Dolman, 2 De G., M. & G. 592; see also Francis *v.* Grover, 5 Hare, 39; Hughes *v.* Williams, 3 Mac. & G. 683; Gough *v.* Bult, 16 Sim. 323; Earl Mansfield *v.* Ogle, 19 Jur. 414. And it makes no difference that the term is reversionary; Snow *v.* Booth, 2 Jur., N. S. 37, 244; 2 K. & J. 132; 8 De G., M. & G. 69.

(*c*) Knight *v.* Bowyer, 23 Beav. 609; 2 De G. & J. 421; 3 Jur., N. S. 968; 4 id. 569.

691. Where (*d*) a debtor executed a legal mortgage and covenanted to pay the debt, and the mortgagee afterwards joined in postponing his debt to another creditor, to whom the estate was thereupon conveyed, in trust to sell and apply the purchase-money in payment of the trustee's debt, and then of the debt of the original mortgagee; and, soon after, the debtor by deed-poll assigned to the original mortgagee certain future property to secure the postponed debt and other debts; a bill filed by the original mortgagee to have the benefit of the deed-poll, more than twenty years after its date, but less than twenty years after the sale, under the trust, of the estate comprised in the original security, was held to be in good time; for the statute did not run against the plaintiff in respect of his original debt whilst the trust-deed was pending, and whilst he might expect to receive payment by means of it, and therefore he still had the benefit of the covenant in the original mortgage deed, to which the deed-poll was only a collateral security, remaining in force during the existence of the original debt.

It will, however, be remembered, that a scheduled incumbrancer, in a deed containing trusts for payment of the scheduled debts, but who is no party to the deed, does not (*e*) come within the description of a *cestui que trust* under an express trust for this purpose.

692. A charge of real estate with payment of debts, with a direction to raise sufficient by mortgage or otherwise, does not create an express trust (*f*); and the trust between vendor and purchaser is not an express trust within sect. 25, but constructive only; for, by sect. 40, twenty years bars every lien on land, but sect. 25 makes no length of time a bar (*g*). A subsisting term agreed to be assigned upon trust

(*d*) Bennett *v.* Cooper, 9 Beav. 252; and see Dillon *v.* Cruise, 3 Ir. Eq. R. 70; Hunt *v.* Bateman, 10 Ir. Eq. R. 360.

(*e*) Law *v.* Bagwell, 4 Dru. & War. 398; Walwyn *v.* Coutts, 3 Sim. 14; 3 Mer. 707; Garrard *v.* Lord Lauderdale, 3 Sim. 1; 2 R. & M. 451.

(*f*) Dickinson *v.* Teasdale, 1 De G., J. & S. 57; 9 Jur., N. S. 236.

(*g*) Toft *v.* Stephenson, 7 Hare, 1. But if the reason given were of any value, the 25th section could have no effect at all upon the 40th; for not liens only, but every kind of charge upon land, is *primâ facie* barred after twenty years by the latter clause.

for the mortgagee is an express trust by virtue of the agreement, though no assignment was executed; and though the term was outstanding and satisfied at the date of the mortgage, the effect of the assignment will not be prevented by merger under 8 & 9 Vict. c. 112 (*h*).

The 25th section does not apply until the time when the party seeking the remedy himself becomes entitled to possession. A person entitled in remainder is, therefore, not bound by the statute, before the period when his right to possession accrues (*i*).

693. In every case of a concealed fraud the right of any person to sue (*j*) for the recovery of any land or rent, of which he, or any one claiming through him, may have been deprived by such fraud, is deemed to have first accrued when and not before such fraud shall, or with reasonable diligence might, have been discovered; saving, however, the rights of *bonâ fide* purchasers for valuable consideration, who have neither assisted in nor had notice of the fraud. But the rules of equity as to refusing relief to persons whose rights are not barred by the act, on the ground of acquiescence or otherwise, remain unaffected (*k*). It is conceived that the 26th section must have an application as extensive as that which relates to express trusts.

694. By 3 & 4 Will. 4, c. 42 (*l*), all actions of covenant or debt upon any bond or specialty, and all actions of debt or scire facias upon any recognizance, must, subject to the savings in case of infancy or other disability, be commenced and sued within twenty years after the cause of action; provided, that if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such specialty or recognizance, or his agent, or by part payment or part satisfaction, on account of any principal or interest being due thereon, the action may be brought within twenty years after such acknowledgment, or within twenty years

(*h*) Shaw *v.* Johnson, 1 Dr. & Sm. 412; 7 Jur., N. S. 1005.

(*i*) Thompson *v.* Simpson, 1 Dru. & War. 459, 489.

(*j*) 3 & 4 Will. 4, c. 27, s. 26.

(*k*) Ibid. s. 27.

(*l*) Sect. 3.

after the termination of disability or absence beyond seas existing at the time of the acknowledgment (*m*). Under this statute, a recital in a conveyance made by the owner of the mortgaged property within twenty years before action brought, to the effect that the principal sum was due, and that all interest was paid, with a covenant by the assignee to pay principal and interest, was held to be sufficient evidence of payment of interest to take the case out of the statute; and subsequent payment of interest by the assignee was held to be sufficient within the statute: for even if it were necessary that the payment should be made by the party liable or his agent, the assignee of the equity of redemption, who covenanted to pay the interest, was considered to be sufficiently an agent for the purpose. And it was intimated on the construction of the act with sect. 40 of 3 & 4 Will. 4, c. 27, that though an action of covenant or debt on a mortgage deed, or of debt on a mortgage bond, would not be taken out of the statute unless the acknowledgment were made *to* the person entitled or his agent, yet on an ordinary bond or covenant, an acknowledgment by the person liable or his agent would be sufficient, though not made to the person entitled or his agent (*n*).

695. The Mercantile Law Amendment Act (*o*) declares, with reference to sect. 3 of 3 & 4 Will. 4, c. 42, and other acts, that when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

696. Persons who have neglected to avail themselves of the Statute of Limitations, and who have been held liable to debts, which the statute, if it had been set up, would have

(*m*) Sects. 3, 4, 5.

(*n*) Forsyth *v.* Bristowe, 8 Exch. 716; 1 C. L. R. 262.

(*o*) 19 & 20 Vict. c. 97, s. 14.

barred, cannot insist upon any right of contribution as against other parties, who, by means of the statute, have repelled the demand against them. Nor will the right to marshal assets be, in general, kept on foot for the purpose of indirectly giving a creditor a right to come upon real estate, after his remedy against it has been otherwise barred by the statute (*p*); though under special circumstances, as where (*q*) a suit had miscarried by no fault of the plaintiff, but by a general misapprehension of the rights of the parties, and the bill had been properly framed for marshalling, a simple contract creditor has been held, by virtue of the equity of marshalling, not to be barred by the statute.

Of the Evidence of the Security.

697. The mortgagee can have no relief, unless the mortgage deed or security be admitted or proved (*r*).

Like other instruments, in the establishing of which proof of the handwriting of the person subscribing is necessary, it may be proved at the hearing, where its execution is not controverted, though its validity may be in question (*s*), either *vivâ voce* or by affidavit (*t*). But it cannot be proved as an exhibit at the hearing, if it be impeached for fraud, especially if one of the attesting witnesses be alleged to have been concerned in the fraud by which the execution of the deed was obtained (*u*). Where the execution and the payment of the consideration are contested by a person who is not a party to the deed, it must be proved by the witness, though the mortgagor admit the execution, in order that there may be an opportunity for cross-examination (*x*).

(*p*) Fordham *v.* Wallis, 10 Hare, 217; 17 Jur. 228.

(*q*) Vickers *v.* Oliver, 1 Y. & C. C. C. 211; and see 1 Jo. & Lat. 534.

(*r*) 18 Beav. 304.

(*s*) Booth *v.* Creswicke, 8 Jur. 323.

(*t*) 1 Dan. Pr. 816, ed. 4; 43rd Ord. Aug. 1841; Rowland *v.* Sturgis, 2 Hare, 520: but an order must still be obtained to prove at the hearing (Clare *v.* Wood, 1 Hare, 314). As to the proof where the deed is not denied, but no replication (see Rowland *v.* Sturgis, 2 Hare, 520; Chalk *v.* Raine, 7 Hare, 393; Jones *v.* Griffith, 14 Sim. 262). The evidence of the mortgagor himself will not be allowed to be substituted for that of the attesting witness. (Whyman *v.* Gath, 1 C. L. R. 482).

(*u*) Hitchcock *v.* Carew, Kay, xiv.

(*x*) Leigh *v.* Lloyd, 35 Beav. 455.

698. If the security be attested by one witness only, who afterwards becomes entitled to the mortgage, proof of his handwriting, by a third person, will be sufficient evidence of the execution of the security (*y*)

699. The payment of the consideration money need not generally be proved, unless the fact be put in issue on the pleadings, the security being sufficient evidence of such payment (*z*); in Ireland it has been held otherwise in the case of a security given by a client to his attorney, strict evidence of the payment of the money being then required (*a*). In England it appears that receipts are admitted as *primâ facie* evidence of advances, but where the security is for the balance found due on a settled account, the solicitor must be prepared with evidence that the client was not under pressure or undue influence, and that the account was stated upon the production of books or other proper evidence, and under circumstances which enabled the client to judge of the result of the transactions between himself and the solicitor (*b*); and where the security does not express the real nature of the transaction, it must also be supported by extrinsic evidence (*c*). And where there is room for the exercise of undue influence, as if a security be obtained by a person without consideration from a woman with whom he is under a contract of marriage, he must show that the transaction was fair and not procured by false representation. But this is only as between the parties giving and taking the benefit of the transaction; for no such duty is cast upon a purchaser of the security for valuable consideration, not privy to the fraud (*d*).

700. The question whether the mortgage ever subsisted as a security, where from the circumstances under which it was executed (*e*), the alleged lunacy of the mortgagor (*f*), or

(*y*) Inman *v.* Parsons, 4 Mad. 271.

(*z*) Minot *v.* Eaton, 4 L. J., Ch. 134.

(*a*) Lawless *v.* Mansfield, 1 Dru. & War. 557, 605; and see Carter *v.* Palmer, 1 Dru. & Wal. 722.

(*b*) Judd *v.* Ollard, 5 Jur., N. S. 755; Davies *v.* Parry, id. 759; 1 Gif. 174; Morgan *v.* Higgins, 1 Gif. 270; 5 Jur., N. S. 236.

(*c*) Per Lord Eldon in Lewes *v.* Morgan, 5 Pr. 143; 4 Dow. 53.

(*d*) Cobbett *v.* Brock, 20 Beav. 524; and see Cooke *v.* Lamotte, 15 Beav. 234; Hoghton *v.* Hoghton, id. 278.

(*e*) Melland *v.* Gray, 2 Y. & C. C. C. 207; Wynne *v.* Styan, 2 Ph. 303.

(*f*) Snook *v.* Watts, 11 Beav. 105.

other matters, doubts have arisen on that point, or where the security is not proved on the one, or admitted on the other side (*g*), may be ascertained by inquiry, or if necessary an issue will be directed.

If the deed be *primâ facie* valid, having been proved by the attesting witness without any attempt to impeach it by cross-examination, the court will not refuse (*h*) to act upon the deed, by reason of the production, at the hearing, of evidence of circumstances (such as the prior lunacy of the mortgagor, although found by inquisition), which tend to invalidate it. The person who claims under a deed is not bound to prove the sanity of the grantor, and after the deed has been proved in the usual manner, without objection, the defendant can only have active relief, in respect of its alleged invalidity, by filing a cross-bill to set it aside, when the party impeaching it can be put upon equitable terms. But relief has been given in such a case (*i*), by directing the claim to be retained for a year, the plaintiff to bring ejectment, and the defendants undertaking not to set up any outstanding legal estate; and the suit to be dismissed with costs, if the plaintiff did not proceed to trial within the time specified, but otherwise further consideration was reserved.

701. It is, however, to be remembered, that to invalidate a contract by a person suspected or found to be a lunatic, it is not enough (*k*) to show lunacy at the date of the contract; it must also be shown that the grantee knew, and took advantage of, the grantor's state of mind. And if a mortgage be made without notice of the lunacy, and the money were duly paid (as to which, if there be any suspicious circumstances, the court will direct an inquiry), the security will be ordered to stand for the amount advanced, though lunacy, at the execution of the conveyance, be admitted at the hearing (*l*). It is immaterial in such cases whether the suit be by the mortgagee

(*g*) Guardner *v.* Boucher, 13 Beav. 68.

(*h*) Jacobs *v.* Richards, 18 Beav. 300; 18 Jur. 527.

(*i*) Id.; 18 Beav. 308, note; 5 De G., M. & G. 55; 23 L. J., Ch. 557.

(*k*) Neill *v.* Morley, 9 Ves. 478; see also Price *v.* Berrington, 3 Mac. & G. 486; Baxter *v.* Earl of Portsmouth, 5 B. & C. 170.

(*l*) Kirkwall *v.* Flight, 3 W. R. 529; Campbell *v.* Hooper, 19 Jur. 670; 3 Sm. & G. 153.

for foreclosure, or by persons claiming, under the mortgagor, to set aside the deed (*m*). And where an illegal agreement has been added to a security, a decree of foreclosure may be made upon nonpayment of what shall be found due on the original mortgage, if the bill pray general relief; though the bill will be dismissed, so far as it seeks relief founded on the illegal agreement (*n*). If a suit to deliver up securities for fraud and for further relief fails, the court does not decree redemption (*o*).

702. In suits by the first mortgagee, if the plaintiff prove the subsequent incumbrances, he may at once have a decree for redemption or foreclosure against the owners of them, according to their priorities. But if the subsequent incumbrances be not proved nor admitted, or if their priorities be disputed, the course is to direct an inquiry upon these questions (*p*). And there will be no decree, until the securities have been established, and the priorities of the respective incumbrancers inquired into and settled (*q*); for the incumbrancers cannot be excluded or postponed, without a declaration of their rights by the decree.

Chapter VI. Part 2. — Of the Personal Remedy against the Debtor.

703. Upon the breach of an absolute covenant for payment of the debt on a certain day, the mortgagee may maintain an action either of debt or on the covenant, whether the covenantor be principal or surety (*r*); but on the covenant only, where, as in the case of an annuity charged on land, the liability of the covenantor does not arise until failure in payment by the *terre tenant* (*s*); or where the qualified form of the covenant implies that there is no personal contract for

(*m*) Campbell *v.* Hooper, supra.

(*n*) Powney *v.* Blomberg, 14 Sim. 179.

(*o*) Johnson *v.* Fesenmeyer, 25 Beav. 88; 3 De G. & J. 13.

(*p*) Guardner *v.* Boucher, 13 Beav. 68.

(*q*) Duberly *v.* Day, 14 Beav. 9.

(*r*) Evans *v.* Jones, 5 M. & W. 295.

(*s*) Randall *v.* Rigby, 4 M. & W. 130.

repayment, upon which an action can be brought: as where the covenantor, borrowing in the character of a trustee under a will, covenants for repayment out of money coming to his hands as trustee from the mortgaged lands, or from the personal estate of his testator (*t*) (**1323**).

704. A covenant for payment of the mortgaged debt will generally be implied, if the deed contain a stipulation for payment on a certain day (*u*). But if, as it sometimes happens in a mortgage of public works, the money be simply borrowed on the security of the property or undertaking and duties, without preference between creditors in respect of priority of advances, and the trustees are under no obligation to set aside part of the money received towards keeping down the interest, so as to give the creditors a *legal* right to insist on payment, the interest is in effect merely payable out of the rates and duties; and the terms of the contract are satisfied by giving the lenders a claim against the undertaking, without a right to sue the corporation, notwithstanding a provision for payment of the interest at a fixed time. In the absence of a covenant for payment no action will lie in such a case for principal or interest, and the creditor can only enforce his rights as mortgagor of tolls by bill in equity, or by determining the possession of the tolls by the trustees (*x*). It is different where the creditors are holders of bonds, though by virtue of them they have a lien on the monies arising under the act in proportion to their advances, as if mortgages without priority had been granted. The lien is then an additional security only, and every bondholder may sue on his own bond, because the company may have other property to answer his demand (*y*).

705. A covenant for payment will be implied by an admission, coupled with an agreement, to execute a security which

(*t*) Matthews *v.* Blackmore, 1 H. & N. 762.

(*u*) Hart *v.* Eastern Union Railway Company, 7 Exch. 246; 8 id. 116; and see the provision to that effect in sect. 50 of the Companies Clauses Act (8 & 9 Vict. c. 16.)

(*x*) Pontet *v.* Basingstoke Canal Company, 3 Bing. N. C. 433; Pardoe *v.* Price, 11 M. & W. 427; 13 id. 267; 14 L. J., N. S., Exch. 212. See also 16 M. & W. 451.

(*y*) Hill *v.* Manchester, &c. Waterworks Company, 2 B. & Ad. 544.

would create a specialty debt, or even (*z*) by a mere admission in a deed, of liability, provided it do not appear that it was not the object of the deed to make the debtor liable on covenant. If the deed were executed for the purpose of creating a security for the debt by other means, and the debt were referred to only for ascertaining the amount to be secured, or otherwise for a collateral purpose, as by way of recital in an appointment of new trustees, no covenant will be implied, though the deed contain an admission or acknowledgment of the debt (*a*).

706. Where the mortgage contains no covenant for payment, the mortgagee may sue at law either in assumpsit or in debt, if the security be collateral to the debt, and not taken in satisfaction of an existing debt; for then the contract will have merged in the security which is of a higher nature, as under like circumstances the remedy on simple contract will merge in a bond or covenant (*b*) (**1445**).

707. Where the covenant for payment is only personal a legatee of the debt cannot sue on the covenant in his own name, because such a covenant is not assignable; nor can an assignee sue in respect of a breach of the covenant which happened before his own time (*c*).

708. To a plea of payment in an action by a mortgagee on the covenant, a recital in a subsequent mortgage made to the same mortgagee, by a purchaser from the mortgagor, that the purchaser had agreed to convey the property to the mortgagee free from incumbrances, is a conclusive support unless the recital be rebutted by the strongest evidence (*d*).

709. Where the mortgagor of a policy of insurance, the insurers being the mortgagees, covenants with them to keep up the policy, or in default that the insurers may pay and

(*z*) Saunders *v.* Milsome, L. R., 2 Eq. 573.

(*a*) Courtney *v.* Taylor, 7 Scott, N.R. 749; Marryatt *v.* Marryatt, 28 Beav. 224.

(*b*) Yates *v.* Aston, 4 Q. B. 182; Price *v.* Moulton, 10 C. B. R. 561. See Holmes *v.* Bell, 3 M. & G. 213; Norfolk Railway Company *v.* M'Namara, 3 Exch. 628.

(*c*) Canham *v.* Rust, 2 Moore, 164; 8 Taunt. 227.

(*d*) Jones *v.* Williams, 2 Stark. 52.

add the premiums to the mortgage debt, but there is no covenant to repay them the premiums; the mortgagees in an action against the mortgagor for breach of the covenant to keep up the policy, are entitled only to nominal damages, the addition of the premiums to the debt being the remedy provided; but under a covenant to repay, the amount paid would have been given as damages (*f*).

It seems that a pledge of a policy of insurance upon a ship gives the pledgee an implied authority to sue on the policy in the name of the insured (*g*).

710. Although the receipt indorsed on a mortgage to a benefit building society vacates the mortgage by force of the statute (6 & 7 Will. 4, c. 32, s. 5), a covenant in the deed, for payment of the subscriptions due to the society, is not extinguished; and though the deed be required to be given up, a copy of it may be preserved for the purposes of the covenant (*h*).

711. The pawnee of stock, or of an ordinary chattel, may also bring debt or assumpsit against the pawnor, whether the pawn were effected by himself or his agent, under an express or implied authority to recover the sum due, unless there be a special agreement that the pledge only shall be liable; and he may recover without returning the pledge, for which the debtor must bring trover (*i*). If in consequence of the wrongful conversion of the pawn by the pawnee, the pawnor has recovered the value of it by action, the debt remains, unless it was deducted in the action (*k*). So where the pawn being of a perishable nature, and no time for redemption limited, the pledgor stays till it is perished and spoilt, there being no default in the pledgee, he shall have debt for his money, and the other no remedy for his pawn (*l*).

(*f*) Brown *v.* Price, 4 Jur., N. S. 882.

(*g*) Jardine *v.* Leathley, 9 Jur., N. S. 1035; 3 B. & S. 700.

(*h*) Farmer *v.* Smith, 4 H. & N. 196; 5 Jur., N. S. 133, n.

(*i*) South Sea Company *v.* Duncomb, 2 Str. 919; Lawton *v.* Newland, 2 Stark. 72. Per Holt, C. J., 12 Mod. 564.

(*k*) Story, Bailments, § 315.

(*l*) Per Fleming, C. J., Ratcliff *v.* Davis, Yelv. 178.

CHAPTER VI. PART. 3.—OF THE APPOINTMENT OF A RECEIVER.

712. *Of the Appointment of a Receiver by the Parties.*
718. *Of the Appointment of a Receiver by the Court of Chancery.*
727. *Of the Nature of the Appointment.*
729. *In whose favour and against whom the Receiver may be appointed.*
757. *Of what Property a Receiver may be appointed.*
763. *At what Stage of the Cause the Receiver may be appointed.*
768. *Of the Authority of the Receiver.*
785. *Of his Right to apply to the Court.*
786. *Of his Possession.*
793. *Of his Expenditure.*
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804. *Of his Allowances.*
809. *Of passing his Accounts.*
812. *Of the Payment of Balances by the Receiver, his Representatives and Sureties, and of the Liability to Interest.*
822. *Of the Discharge of the Receiver.*

Of the Appointment of a Receiver by the Parties.

712. The security sometimes contains an appointment of, or a power for the mortgagee to appoint a person to be receiver or receiver and manager of the mortgaged property, in order to secure to the mortgagee the payment of his interest out of the rents and profits. And a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of hereditaments of any tenure upon which any principal money is secured or charged by deed, or over any interest therein, may, by statute (*a*), be exercised (unless the power be negatived by express declaration in the security and subject to any variations or limitations therein contained) by the person to whom such money shall for the time being be payable, his executors, administrators or assigns, at any time after the expiration of one year from the time when such principal money shall have become payable according to

(*a*) 23 & 24 Vict. c. 145, ss. 11, 32. Applicable "only to mortgages or charges made to secure money advanced or to be advanced by way of loan or to secure an existing or future debt."—Sect. 24.

the terms of the deed, or after any interest thereon shall have been in arrear for six months, or after any omission to pay any premiums on any insurance, which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge.

713. Any person entitled to appoint or obtain the appointment of a receiver may appoint any person or persons who may have been named in the deed of charge for that purpose, or any one of them, to be receiver or receivers; or if no person be so named may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require him or them to appoint a fit and proper person as receiver; and if no such appointment be made within ten days after such requisition, then the person entitled to appoint may in writing appoint any person he may think fit (*b*).

714. Every receiver appointed as aforesaid is deemed to be the agent of the person entitled to the property subject to the charge, who is to be solely responsible for his acts or defaults, unless otherwise provided for in the charge (*c*). And the receiver shall have power to demand, recover and give effectual receipts for all the rents, issues and profits of the property of which he is appointed a receiver, by action, suit distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of (*d*).

The receiver may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time (*e*). And the receiver may retain out of the money received by him in lieu of all costs, charges and expenses such a commission not exceeding 5 per cent. on the gross amount of all money received by him as

(*b*) Sect. 17.
(*c*) Sect. 18.
(*d*) Sect. 19.
(*e*) Sect. 20.

shall be specified in his appointment, and if no amount shall be so specified, then 5 per cent. on such gross amount (*f*).

715. The receiver shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge, whether affixed to the freehold or not, which is in its nature insurable (*g*). And shall pay and apply all the money received by him, in the first place, in the discharge of all taxes, rates and assessments whatsoever, and in payment of his commission, and of the insurance premiums, if any, and in the next place in payment of all the interest accruing in respect of any principal money then charged on the property over which he is receiver, or any part thereof; and shall pay the residue to the person for the time being entitled to the property, subject to the charge, his executors, administrators or assigns (*h*).

716. The receiver is the agent of the mortgagor (*i*), as well where he is appointed by the parties as under the act; and in the former case his powers are usually clearly defined by the instrument of appointment. And where a person is appointed by the mortgagee to receive the profits of the estate from the mortgagor, the appointment only amounts to a possession by the mortgagee so long as the receiver actually pays him the profits (*h*).

717. A receiver jointly appointed by the mortgagor and the mortgagee to be the agent and attorney of the former, and to receive rents, bring ejectments and actions, give notices to quit, grant leases and do other matters as effectually as the mortgagors, their executors, administrators or assigns could have done, if the deed had not been executed, has authority to demand possession of a tenant under 4 Geo. 2, c. 28, s. 1, so as to make him liable in double value for holding over (*l*).

(*f*) Sect. 21.

(*g*) Sect. 22.

(*h*) Sect. 23.

(*i*) Jefferys *v.* Dickson, L. R., 1 Ch. App. 183; 2 David's Conv. 566, ed. 2. See Law *v.* Glenn, W. N., 1867, 236.

(*k*) Juggeewundas Keeka Shah *v.* Ramdas Brijbookundas, 2 Moo. Ind. App. 487.

(*l*) Poole *v.* Warren, 3 Nev. & P. 693; 8 Ad. & El. 582.

And a receiver under the Court of Chancery, acting under the usual order, is invested with the like power (*m*).

Of the Appointment of a Receiver by the Court of Chancery.

718. Under certain circumstances, and on the application of some or one of the parties interested in the incumbered estate, but not of a stranger (*n*), the Court of Chancery will appoint a receiver, who shall get in and take charge of the outstanding parts, and rents and profits, and see to the management of the estate, applying the monies received according to the directions of the court, and accounting to the court for such application.

719. A receiver may be ordered either on motion or petition, but not unless a bill (*o*) be first filed, even over the estate of an infant. The suit should be properly constituted (*p*); for the account ought to proceed upon such a record as will enable the judge to determine who is to take the fund, which the appointment of a receiver shall have caused to be brought into court. Where the object of the suit is merely the protection of the property by means of a receiver, the bill ought not to seek discovery upon other matters (*q*). Such a form of bill will not, however, prevent the appointment of the receiver where there is a clear title to that relief; but the defendant will not be compelled to answer the whole, though he may have thought proper to answer part of the irrelevant matter in the bill. And note, that it is not necessary or proper to bring a suit merely for the appointment of a receiver, pending a suit in another court, to a hearing (*r*). Wherefore a motion to dismiss such a suit for want of prosecution will be refused with costs (*s*). But the court will make a decree, by

(*m*) Wilkinson *v.* Colley, Burr. 2694.

(*n*) A.-G. *v.* Day, 2 Mad. 246. In this case it appears that the masters of the court claimed a right to nominate a receiver, if the parties interested neglected to do so; but the court did not confirm the claim.

(*o*) Anon., 1 Atk. 578; Ex parte Mountford, 15 Ves. 445. See, however, Pitcher *v.* Helliar, 2 Dick. 580.

(*p*) Gray *v.* Chaplin, 2 Russ. 126, 147.

(*q*) Wood *v.* Hitchings, 3 Beav. 504; and see De Feucheres *v.* Dawes, 5 Beav. 110.

(*r*) Anderson *v.* Guichard, 9 Hare, 275; Barton *v.* Rock, 22 Beav. 81, 376.

(*s*) Edwards *v.* Edwards, 17 Jur. 826.

consent (*t*), for the continuance of the receiver, and for payment of costs and investment of the fund in court.

720. The application for a receiver ought not to be *ex parte* (*u*), and cannot be granted on a notice of motion served personally, unless such service be by special leave of the court (*x*). And it seems that this practice remains unchanged, although, by the rules of the court, a plaintiff may without special leave serve notices or petitions personally at the dwelling-house or office of any defendant who, having been duly served with the copy bill, shall not have appeared thereto within the time limited (*y*).

721. The first application in a cause for a receiver, in the place of a person already in possession, must be made in court; but a new receiver may be appointed in chambers, where a vacancy has been occasioned by death, or otherwise; or where, as by the death of the owner of the property, there is no person in possession (*z*). And it seems that an original appointment may, also, by consent, be ordered in chambers (*a*).

722. Upon application by motion, or petition, to the court, in any suit for the appointment or discharge of a receiver, the defendant's answer, for the purpose of evidence on the motion or petition, is only treated as his affidavit, and affidavits may be received and read in opposition thereto (*b*); but the court pays no attention to statements in the affidavits of the plaintiff, which are not founded upon equities alleged in or claimed by the bill; and matter not so founded need not be answered by the defendant (*c*). Where the case made by the bill fails, it seems that the plaintiff will not (*d*) be allowed to rely, as

(*t*) Anderson *v.* Guichard, supra.

(*u*) Buxton *v.* Monkhouse, Coop. 41.

(*x*) Ramsbottom *v.* Freeman, 4 Beav. 145.

(*y*) Jacklin *v.* Wilkins, 6 Beav. 107. Motion for injunction, on personal service, before appearance, refused; but, note, that the time for appearance had not expired, which it had in Ramsbottom *v.* Freeman; and III. Cons. Ord. s. 6, makes personal service good only where no appearance has been entered at the time limited by the General Orders of the court.

(*z*) Grote *v.* Bing, 20 L. T. 124; 9 Hare, App. 1.

(*a*) Blackborough *v.* Ravenhill, 16 Jur. 1085.

(*b*) 15 & 16 Vict. c. 86, s. 59.

(*c*) Dawson *v.* Yates, 1 Beav. 301.

(*d*) Cremen *v.* Hawkes, 2 Jo. & Lat. 674.

a ground for a receiver, upon an equity confessed by the answer.

723. Where A., having been appointed a receiver and not having acted, has been removed on his own application, and B. has been appointed in his place, a motion that C. may be appointed instead of B. upon the like security, and without going before the officer is irregular; but such a motion has been granted on consent (*e*).

The court is unwilling to disturb an appointment which has once been made, and will not do so unless the person chosen be shown to be unfit, or upon a mere question of the relative fitness of the competitors for the office (*f*).

A reference has been granted (*g*) to approve of a person to succeed the consignee of a West India estate in the event of his death, he being in a dangerous state of health; but this was done unwillingly, because the person chosen might cease to be a proper person before the commencement of his office. The order seems to have been made only on the consideration that the point must come before the court again upon the report; and the change of practice in this respect makes it probable that no such order would now be made.

724. Where a bill is taken pro confesso no proceeding is to be taken, and no receiver appointed under the decree, and no sequestrator, under any sequestration issued in pursuance thereof, is to take possession of, or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the decree, without leave of the court; which is to be obtained on notice served on such defendant, or his solicitor, unless the court dispenses with such service (*h*). This order assumes that the receiver may be appointed under the decree, and it means that no proceeding is to be taken after the appointment. An application to discharge a receiver, on the ground that his

(*e*) Anon., 2 Mol. 502.

(*f*) Creuze *v.* Bishop of London, 2 Bro. C. C. 253; Thomas *v.* Dawkins, 1 Ves. jun. 452; Bowersbank *v.* Colasseau, 3 Ves. 164; Anon., id. 515; Tharpe *v.* Tharpe, 12 Ves. 317; Wynne *v.* Lord Newborough, 15 Ves. 283.

(*g*) Forbes *v.* Hammond, 1 Jac. & W 88.

(*h*) XXII. Cons. Ord. s. 13.

appointment was made without special notice to the defendant or his solicitor, was therefore refused with costs (*i*).

725. The receiver is required to give security (by himself and two or more sureties (*k*).) duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, or to be answerable for what he shall receive in respect of the personal estate which he is to get in, and to account for and pay the same respectively as the court shall direct; and a different mode of giving security, as, for instance, by the assignment of a mortgage, is improper (*l*). The security is generally for double the annual rental to be got in (*m*); and where debts or outstanding estate are to be got in, security is given to the full, or something beyond the full amount which is ordered or expected to be received (*n*). The receiver may also be restricted from getting in the principal of mortgage debts (*o*), that the amount of the security to be given may be lessened; or, with the same object, part of the estate may be ordered to be brought into court for safe custody (*p*); and the like has been done in the case of the committee of a lunatic; a direction being however added, that such securities as were of an objectionable kind should be called in (*q*).

The court will not generally dispense with sureties, even by consent of the parties interested (*r*). But if they, being competent to consent, will appoint a receiver of their own authority, the court will allow him to act without finding sureties (*s*). This course has been followed where (*t*) the

(*i*) Dresser *v.* Morton, 2 Ph. 285.

(*k*) Set., ed. 2, 533; ed. 3, 1007; XXIV. Cons. Ord. s. 1.

(*l*) Mead *v.* Lord Orrery, 3 Atk. 235; 13th Order, 16th Oct. 1852.

(*m*) Set., ed. 2, 533; ed. 3, 1007.

(*n*) The practice may depend in some measure upon the particular circumstances. In a late case, although the property was very large, a comparatively small security was required, on the ground that the outgoings being considerable, the receiver would not be likely to have much money in hand. The author is indebted to MR. J. W. HAWKINS for information upon these points.

(*o*) Bather *v.* Kearsley, ex relatione Mr. J. W. HAWKINS.

(*p*) Poole *v.* Wood, Set., ed. 2, 533.

(*q*) Re Eagle, 2 Ph. 201.

(*r*) Manners *v.* Furze, 11 Beav. 30; Tylee *v.* Tylee, 17 Beav. 583.

(*s*) Ridout *v.* Earl of Plymouth, 1 Dick. 68; Carlisle *v.* Carlisle, 1761, cited there; Manners *v.* Furze, 11 Beav. 30.

(*t*) Hibbert *v.* Hibbert, 3 Mer. 681.

devisor of the estate had himself appointed a receiver by his will, stating that he intended by the appointment to give him a pecuniary benefit. And even where all parties were not competent to consent, the circumstance that the receiver had been employed by the testator to manage the estate, was held to be a reason for dispensing with security (*u*); but this seems to go somewhat beyond the modern decisions.

The court also sometimes dispenses with security, where no salary is given to the receiver (*x*).

726. Where a receiver entered into the usual recognizances with sureties, one of whom procured himself to be discharged, and a fresh recognizance was entered into; the time for inrolling the latter having elapsed, it was ordered to be entered *nunc pro tunc* (*y*). But, in a like case, it was added, that the inrolment should not take effect if there were any intermediate purchaser or incumbrancer for valuable consideration of the cognizor's lands, but from the time of inrolment (*z*) (**137, 1184**).

Of the Nature of the Appointment.

727. The appointment, which is a matter of discretion to be governed by the whole circumstances of the case (*a*), is made in the first place for the protection of the estate; the court upon the application will not decide, and the appointment does not affect, the ultimate rights of the parties to the suit (*b*). Nor does it affect the operation of the Statute of Limitations; for otherwise minors would suffer by the putting of the property under the protection of the court (*c*).

728. The appointment is also for the benefit of the incumbrancers (*d*), that they may not be injured by the act of the court in taking possession of the fund to which they were entitled to resort for payment of their interest (**822**). It is

(*u*) Carlisle *v.* Berkley, Ambl. 599.

(*x*) Gardner *v.* Blane, 1 Hare, 381.

(*y*) Vaughan *v.* Vaughan, 1 Dick. 90.

(*z*) Blois *v.* Betts, id. 336.

(*a*) Owen *v.* Homan, 3 Mac. & G. 412; Greville *v.* Fleming, 2 Jo. & Lat. 339.

(*b*) Skip *v.* Harwood, 3 Atk. 564; Blakeney *v.* Dufaur, 15 Beav. 40.

(*c*) Per Lord Hardwicke, 1 Atk. 15; Harrisson *v.* Duignan, 2 Dru. & War. 295; Hunt *v.* Bateman, 10 Ir. Eq. R. 377-8.

(*d*) Bainbrigge *v.* Blair, 3 Beav. 421.

not, however, absolutely for their benefit without their own interference, but only as far as it is expressed to be so, and as they choose to avail themselves of it (*e*). Therefore if an incumbrancer omit to apply for rents, which have been paid into court by the receiver during the minority of an infant tenant in tail, the latter may take them when he comes of age, though the incumbrancer's interest be in arrear; for by his omission to apply, it is presumed that he was satisfied with his security, both for principal and interest: and as he may suffer the interest to run in arrear when the estate is not in the possession of the court, so it may be when there is a receiver. The court neither forces payment upon him, nor sets apart any part of the profits to answer unpaid interest. In like manner, if the mortgagee of a term have suffered the receiver to pay the surplus rents into court, and the term expire, the heir will have the benefit (*f*); the mortgagee being in the same position as a mortgagee in fee, who is entitled only to such rents as accrue during his possession (**1603**); which it seems may date (*g*) from the time of his application for the discharge of the receiver.

In whose favour and against whom the Receiver may be appointed.

729. Before the existence of the statutory right above referred to (**712**), the remedy of the legal mortgagee was to take possession, and not to come for a receiver, which the court would not grant him when he was out of possession, even under circumstances which would entitle him to a receiver if he had taken possession (*h*). And though the exercise of the legal right might be obstructed by difficulties, it did not follow that the equitable remedy would be granted (*i*). Upon the same principle a receiver was denied to an equitable

(*e*) Gresley *v.* Adderley, 1 Sw. 579; Bertie *v.* Lord Abingdon, 3 Mer. 560.

(*f*) Gresley *v.* Adderley, 1 Sw. 573.

(*g*) Thomas *v.* Brigstocke, 4 Russ. 64.

(*h*) Berney *v.* Sewell, 1 J. & W. 647; Sturch *v.* Young, 5 Beav. 557; Cox *v.* Champneys, Jac. 576; Drought *v.* Perceval, 2 Mol. 502.

(*i*) Cremen *v.* Hawkes, 2 Jo. & Lat. 674.

incumbrancer, whose security was vested in a trustee, with powers of entry and distress (*k*). A receiver has, however, been granted in favour of a mortgagee of the legal estate, where the mortgagor, being a surety whose estate was not made liable until the principal's estate should prove insufficient, the insufficiency was denied in equity, and if set up as a defence to an action of ejectment would have led to the trial of a question of accounts at law (*l*). And the same has been done in Ireland in favour of a mortgagee who has made advances to preserve the estate from eviction, notwithstanding regular payment of interest (*m*).

730. A *puisné* mortgagee or other equitable incumbrancer is generally entitled to a receiver (*n*), provided the court be satisfied of the existence of the equitable right in the applicant (*o*); and the appointment may be made for the purpose of keeping down the interest, even though the applicant be unable at the time to enforce the usual mortgagee's remedies, as if (*p*) he have covenanted not to call in the mortgage debt during a certain time; and though by the transaction itself the security gave the creditor no right to be considered as a mortgagee of the estate, but only made the rents a fund for payment of interest and of the premiums upon a policy of insurance, out of the produce of which the principal was to be paid (*q*).

731. This right of the equitable incumbrancer is, however, subject to the general principle, that its exercise must be without prejudice to the prior legal incumbrancer. Therefore, *First.* If such an incumbrancer, to whom something is due, whether his priority be original or acquired subsequently, be actually in possession, no receiver will be appointed (*r*). *Second.* If there be any such incumbrancer who is not in pos-

(*k*) Buxton *v.* Monkhouse, Coop. 41.

(*l*) Ackland *v.* Gravener, 31 Beav. 482.

(*m*) Kelly *v.* Staunton, 1 Hog. 393.

(*n*) 3 Ves. 32; 1 J. & W. 648-9; Dalmer *v.* Dashwood, 2 Cox, 378; Anderson *v.* Kemshead, 16 Beav. 329.

(*o*) 2 Sw. 138; Greville *v.* Fleming, 2 Jo. & Lat. 335.

(*p*) Burrowes *v.* Molloy, 2 Jo. & Lat. 521.

(*q*) Taylor *v.* Emerson, 4 Dru. & War. 117.

(*r*) Berney *v.* Sewell, 1 Jac. & W. 647; Hiles *v.* Moore, 15 Beav. 175; Bates *v.* Brothers, 17 Jur. 1174; 2 Sm. & G. 509.

session, the receiver will be appointed, without prejudice to the right of such person to take possession (*s*).

732. It is only in favour of prior legal incumbrancers that this principle is applied. It will not enable a third mortgagee who, having lent his money with notice of the second mortgage (**1212**), has taken possession, and bought in the first, to hold until payment of his own debt, as well as of that which is due upon the first security (*t*); though it is presumed that a good right to tack would entitle him to hold in such a case against an equitable mortgagee's right to a receiver.

But it has been held to apply (*u*) in favour of persons in possession entitled to prior charges on the estate, though they had applied part of the rents in payment of interest due on part of the prior charges, which, having been paid off by the tenant for life, had been kept alive and assigned for his benefit; it being the proper course, as between the owners of the life estate and of the inheritance, to keep down such interest out of the rents, and not to treat the surplus rents, after payment of the interest of the unpaid part of the principal, as applicable to the discharge of such unpaid principal.

An incumbrancer who is in possession, not in that character, but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver (*x*).

733. Under the first of the rules stated above, the prior mortgagee, in order to save his possession, must be able to swear that something (however small, it seems, may be the amount) (*y*) is due to him upon his security. If he will do so, no receiver will be appointed against him, and the only course is to pay him off according to his own statement of his debt (*z*).

But if he refuse to accept what is due, or confess that he is paid off, or if he will not swear that something is due, the

(*s*) Berney *v.* Sewell, supra; Davis *v.* Duke of Marlborough, 2 Sw. 137; Norway *v.* Rowe, 19 Ves. 153.

(*t*) Hiles *v.* Moore, 15 Beav. 175.

(*u*) Faulkner *v.* Daniel, 3 Hare, 204, n.

(*x*) Archdeacon *v.* Bowes, 3 Anst. 752.

(*y*) Chambers *v.* Goldwin, cited 13 Ves. 378; Quarrell *v.* Beckford, 13 Ves. 377; and cited 1 Jac. & W. 649.

(*z*) Berney *v.* Sewell, 1 Jac. & W. 647; Rowe *v.* Wood, 2 id. 557.

court will appoint a receiver (*a*): and it being the mortgagee's business so to keep his accounts, that he may know whether any thing is due, the incomplete state of his accounts will not help him, though time may be given to make an affidavit of the debt (*b*). It has been intimated (*c*), that where neither party can ascertain what is due, by reason of the negligent mode of keeping the accounts, the court may assume that nothing is due.

The mortgagee, it seems, must swear, that some definite sum is due. It is not enough (*d*) for him to state, in general terms, his belief that when the accounts are taken some particular sum, and parts of other sums, will be found due; without supporting the statement by any accounts, which will serve to test its truth.

Where there is a direct statement in the mortgagee's answer, that some definite sum is due, the court will not try the truth of the statement by affidavits against the answer (*e*).

734. Under the second rule (**731**), the receiver will be appointed without prejudice to the rights of the prior legal owner (*f*), whether he refuse to take, or is otherwise out of possession. And so, if a receiver be sought by one whose security is subject to prior equitable estates, the court will appoint a receiver, not disturbing the prior equities, but directing that the priorities of the several incumbrancers be ascertained (*g*).

735. Where the receiver has been appointed in the absence of the prior mortgagee, the latter must apply to the court for liberty to bring ejectment, which is granted as of course (*h*) (**1568**): but where the appointment was made in a suit, to which the prior mortgagee was a party, at a time at which he was unable to take possession, he may have the

(*a*) Berney *v.* Sewell, Chambers *v.* Goldwin, supra.

(*b*) Codrington *v.* Parker, 16 Ves. 469; Hiles *v.* Moore, 15 Beav. 175.

(*c*) Codrington *v.* Parker, supra.

(*d*) Hiles *v.* Moore, 15 Beav. 175.

(*e*) Rowe *v.* Wood, 2 Jac. & W. 557.

(*f*) Davis *v.* Duke of Marlborough, 2 Sw. 138; Berney *v.* Sewell, 1 Jac. & W. 647; Bryan *v.* Cormick, 1 Cox, 422; Dalmer *v.* Dashwood, 2 Cox, 378; Rhodes *v.* Mostyn, 17 Jur. 1007.

(*g*) Davis *v.* Duke of Marlborough, 2 Sw. 138; Metcalfe *v.* Archbishop of York, 1 M. & C. 547.

(*h*) Bryan *v.* Cormick, 1 Cox, 422; Angell *v.* Smith, 9 Ves. 335; Brooks *v.* Greathead, 1 Jac. & W. 176.

receiver discharged, and an order for possession, when he has been found to be first incumbrancer, and has completed his title to possession (*i*). And no condition will be imposed upon him for payment of any part of the costs which have been incurred in defending the estate against adverse claimants, though the proceedings were beneficial to him, if he merely acquiesced, but took no part in such proceedings (*k*).

736. There are many cases in which a receiver will be appointed, against the legal estate; but in which the court expects the plaintiff to proceed with the most complete and honest diligence to obtain a decree (*l*). The legal mortgagee in possession, whose security is subject to equitable interests, which he refuses to satisfy, may be subjected to a receiver (*m*). And so may a legal owner, who claims under a title which, although not yet set aside, lies under strong suspicion of fraud (*n*): but not where the right is only doubtful, the legal estate having been obtained without fraud, and the rents and profits not being alleged to be in danger (*o*). For the court, it has been said (*p*), always appoints a receiver against the legal title with reluctance; compelled by judicial necessity, the effect of fraud clearly proved, and imminent danger if the intermediate possession should not be taken under the care of the court.

737. There must also be a reasonable probability that the persons, who claim to disturb the possession, will ultimately establish a title to it (*q*). Hence where possession had not

(*i*) Langton *v.* Langton, 1 Jur., N. S. 1078; 7 De G., M. & G. 30.

(*k*) Langton *v.* Langton, supra.

(*l*) 17 Jur. 865.

(*m*) Pritchard *v.* Fleetwood, 1 Mer. 54, 722.

(*n*) Stilwell *v.* Wilkins, Jac. 280; and see Huguenin *v.* Baseley, 13 Ves. 105.

(*o*) Lancashire *v.* Lancashire, 9 Beav. 120; George *v.* Evans, 4 Y. & C. 211.

(*p*) Per Lord Eldon, Lloyd *v.* Passingham, 16 Ves. 70. See White *v.* Smale, where a receiver was appointed in a suit on behalf of grantees of rent-charges with powers of distress and entry for want of protection against which tenants for the property could not otherwise be obtained. (22 Beav. 72.)

(*q*) Bainbrigge *v.* Baddeley, 3 Mac. & G. 413; 13 Beav. 355; Clarke *v.* Dew, 1 R. & M. 103; and see Owen *v.* Homan, 3 Mac. & G. 378, on ground of doubtful title; affirmed by House of Lords, on ground of suspected fraud, 17 Jur. 861; see also Davenport *v.* Davenport, 7 Hare, 217; Haigh *v.* Jagger, 2 Coll. 231; Collard *v.* Allison, 4 Myl. & Cr. 487; Landon *v.* Morris, 5 Sim. 247.

been obtained by fraud, but was held under the sanction of the court, and the property was not shown to be in imminent danger, a receiver was refused on appeal after a verdict at law, not completed by judgment, and after which a motion had been granted for a new trial (*r*). And it seems that even if no order had been made for a new trial, the court would not appoint a receiver (*s*) against a person claiming the legal title, and in possession, so long as the verdict in the applicant's favour is not completed by judgment; until which completion the verdict is not receivable in evidence, and is altogether without credit upon the question of reasonable probability of the success of the person in whose favour it was given. Nor will the question be affected by the circumstance that the legal estate is outstanding in trustees, because they hold for the party whose claim shall be ultimately successful (*t*).

738. A receiver has been appointed against persons in possession of the legal estate, under a voluntary settlement, at the instance of a subsequent purchaser, claiming under the settlor for valuable consideration; on the ground that the purchase, though said to be for an inadequate consideration, had been held to be enforceable (*u*). And so, where the applicant cannot make use of his legal remedy, by reason of a breach on the part of the legal owner in possession of a contract which the court can enforce; such as a contract to execute a mortgage (*x*), or to make a precarious security on an estate tail effectual against the reversion (*y*).

739. A receiver has been refused (*z*) to a husband, setting up an adverse right against his wife and her trustees upon her separate estate; neither his rights, nor those of the wife, being determined. On the other hand, the court will not appoint a receiver, in favour of a person whose right is disputed, where the effect of the order would be to establish the right; even if the court be satisfied that the person against

(*r*) Bainbrigge *v.* Baddeley, supra.
(*s*) Id.
(*t*) Id.
(*u*) Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180.
(*x*) Shakel *v.* Duke of Marlborough, 4 Mad. 463.
(*y*) Free *v.* Hinde, 2 Sim. 7.
(*z*) Wiles *v.* Cooper, 9 Beav. 294.

whom the demand is made is fencing off the claim. Therefore a receiver of tithe rent-charge was refused, on the summary application (*a*) of a person claiming to be, and making affidavit (but without further proof) that he was lay impropriator, where his title was contested, and the only payments of tithes made to him had been made by a receiver (*b*).

740. Where the legal title to a ship was in question, a receiver was refused, but the court made an order (*c*), by which the legal proceedings for ascertaining the title were accelerated, and took possession of the ship; giving each party liberty to apply for the possession or use, upon giving security to deal with her as the court should direct.

741. A receiver will not be appointed at the instance of one of several persons entitled to a charge upon an estate which is vested in trustees, upon trusts for sale of the estate, and payment of the charges, where it is not shown that the appointment would be beneficial to the estate, and no misconduct (*d*) or mismanagement is imputed to the trustees; nor against consignees of colonial estates, entitled to the consignments under a covenant, where they have duly applied the produce, and have neither made an oppressive use of their powers, nor an improper disposition of the surplus (*e*).

And no receiver will generally be appointed, merely on account of the death or disclaimer of some or one of several trustees, without the consent of the others, or other of them (*f*); but in such cases (*g*), or if the estate be endangered by the misconduct of one trustee (*h*), a receiver will be appointed on the consent of the others; and without any consent where all the trustees misconduct themselves (*i*).

On the disclaimer of one trustee, a receiver has, however, been appointed against the other, giving liberty to either [each ?] to offer himself (*k*).

(*a*) See 1 & 2 Vict. c. 109 (Ireland), s. 30.

(*b*) Greville *v.* Fleming, 2 Jo. & Lat. 335, there being no appeal against an order so made.

(*c*) Ridgway *v.* Roberts, 4 Hare, 106.

(*d*) Barkley *v.* Lord Reay, 2 Hare, 308.

(*e*) Bunbury *v.* Winter, Jac. 255.

(*f*) Browell *v.* Read, 1 Hare, 434.

(*g*) Tidd *v.* Lister, 5 Mad. 433; Brodie *v.* Barry, 3 Mer. 695; Beaumont *v.* Beaumont, cited id. 696.

(*h*) Middleton *v.* Dodswell, 13 Ves. 268.

(*i*) Wilson *v.* Wilson, 2 Keen, 249.

(*k*) Tait *v.* Jenkins, 1 Y. & C. C. C. 492; Fall *v.* Elkins, 9 W. R. 861.

742. It is contrary to the practice to appoint a receiver against one legal joint tenant, or tenant in common in possession, on the application of another, because the person seeking the appointment may have relief at law (*l*); or against one of such tenants being entitled to and having possession, though not having the legal estate, unless there be evidence that he have excluded the others from the profits (*m*); but there may be a receiver of the applicant's share of the rents and profits (*n*). A receiver has also been appointed (pending a partition suit in a case of doubtful title) (*o*), of the rents and profits of a moiety of the estate, with power to manage, set and let such moiety, with the approbation of the Master; though Lord Northington objected to appoint a receiver of an undivided moiety, because he cannot let, set or distrain without the owner's consent (*p*). In *Hargrave* v. *Hargrave*, however, the existence of outstanding terms prevented the plaintiff from getting relief at law, placing him in the position of a tenant in common in equity, who, having no legal remedy, may have a receiver; unless if the court think fit, the tenant in possession will give security to account for the applicant's share of the rents (*q*).

743. Where some of the owners are infants, there may also be a receiver over the whole estate, with direction to pay the shares of the adults in the rents to them (*r*). And the object here being to protect the estate during the minorities of all the infants, the receiver will not be discharged as to the share of one of them who has attained his full age. The application, it seems, should be for payment of the share of the adult to himself.

744. A receiver may be appointed in a foreclosure suit against the mortgagor in possession, having the legal title, on

(*l*) Tyson *v.* Fairclough, 2 Sim. & St. 142, disapproving of Milbank *v.* Revett, 2 Mer. 405, where the same principle was considered to be applicable to partners and tenants in common.

(*m*) Sandford *v.* Ballard, 30 Beav. 109; 7 Jur., N. S. 651; 33 Beav. 401; 10 Jur., N. S. 251.

(*n*) Id. 30 Beav. 109; 7 Jur., N. S. 651.

(*o*) Hargrave *v.* Hargrave, 9 Beav. 549.

(*p*) Willoughby *v.* Willoughby, cited 2 Dick. 478; see Calvert *v.* Adams there.

(*q*) Street *v.* Anderton, 4 Bro. C. C. 414.

(*r*) Smith *v.* Lyster, 4 Beav. 227.

the application of an equitable mortgagee (*k*); and over the rents and profits, where there are several mortgagors, tenants in common, though one of them be absent, if the other be in possession of the rents (*l*). But there is a difficulty in giving this relief in a redemption suit, because it is not generally competent for a defendant to apply for relief against a plaintiff without filing a cross bill (*m*). A receiver was accordingly refused (*n*), on an application, after the hearing, to add the appointment to the decree; though it was said that perhaps it might have been done on petition upon due notice given. And even where the plaintiff has asked a receiver by his bill, the court will not make the appointment on the defendant's application (*o*), if the plaintiff oppose it: but no costs will be given under such circumstances to the plaintiff.

745. Nor can a defendant ask for a receiver at the hearing against a co-defendant: but after decree, the court appointed a receiver against a defendant, being mortgagee in possession, at the instance of a co-defendant, for the protection of the rents; it appearing, by the Master's report, that the mortgagee in possession had held for many years, and was chargeable with a considerable sum for occupation rent; and it being shown that he had delayed the accounts and could not state clearly that anything remained due on his prior security, by virtue of which he held possession (*p*).

So a receiver has been appointed in a foreclosure suit, after decree, against the mortgagee, as part of the terms upon which the time for redemption was enlarged (*q*) (**1789**); for the purpose of enabling the defendant to appeal against the decree establishing the mortgage.

746. It has been considered (*r*) that no receiver can be

(*k*) Aberdeen *v.* Chitty, 3 Y. & C. 379.

(*l*) Holmes *v.* Bell, 2 Beav. 298.

(*m*) Brown *v.* Newall, 2 My. & C. 558; Wynne *v.* Griffith, 1 Sim. & St. 147; ——— *v.* ———, 2 Dick. 778.

(*n*) Barlow *v.* Gains, 8 Beav. 329.

(*o*) Robinson *v.* Hadley, 11 Beav. 614.

(*p*) Hiles *v.* Moore, 15 Beav. 175.

And under particular circumstances an injunction may be granted against a defendant at the suit of a co-defendant. (Edgcumbe *v.* Carpenter, 1 Beav. 71.)

(*q*) Monkhouse *v.* Corporation of Bedford, 17 Ves. 380.

(*r*) Lyde *v.* Hale, 4 L. J. (Ch.), N. S. 180; Shaw *v.* Shore, 5 id. 79, and cases cited there; Stratton *v.* Davidson, 1 R. & M. 484.

appointed over an estate where the equitable owner, being out of the jurisdiction, cannot be served with a subpœna; and an appointment made by Lord Eldon at the instance of a *puisné* incumbrancer, in a case (*s*) in which the mortgagor was absent, was thought not to be opposed to this rule; because the first mortgagee, by whose refusal to take possession the applicant was alone prevented from doing so, was before the court. But it was not observed that in the case of *Coward* v. *Chadwick* (*t*), which was much relied on in support of this view, and in which it does not appear that a prior mortgagee was present, Lord Eldon also appointed a receiver on appeal. The reasoning of Lord Eldon was, that if the residence of the mortgagor out of the jurisdiction should have the effect imputed to it, the mortgagee might in effect lose his remedy. In the case of an absconding owner, whose residence is unknown, the authorities seem to be conclusive that a receiver may be appointed (*u*). Where his residence is known and there is no difficulty in serving him the case seems to be now met by the act which allows service out of the jurisdiction (*x*).

747. The exercise by the father of an infant of the power given by 12 Car. 2, c. 24, ss. 8, 9, to appoint a testamentary guardian, to whom the statute gives the custody of the profits of the infant's lands and the management of his personal estate, does not affect (*y*) the right of the court to appoint a receiver, the guardian having no estate and the extent of his powers being uncertain.

748. A judgment creditor may have a receiver over the debtor's real or personal estate, after execution (*z*). But as to the real estate, he can have no receiver where an *elegit* has not been issued, unless one year have elapsed from the time of entering up the judgment (*a*).

(*s*) Tanfield *v.* Irvine, 2 Russ. 149.

(*t*) 2 Russ. 150, note; on App. id. 634. See ——— *v.* Chadwick, 4 L. J. (Ch.) 67.

(*u*) Dowling *v.* Hudson, 14 Beav. 423; see Coward *v.* Chadwick, supra; Gibbins *v.* Mainwaring, 9 Sim. 77; Maguire *v.* Allen, 1 Ba. & Be. 75; Quin *v.* Gunn, 1 Hog. 75; and see other cases cited 14 Beav. 424, note.

(*x*) 4 & 5 Will. 4, c. 82.

(*y*) Gardner *v.* Blane, 1 Hare, 381.

(*z*) Rhodes *v.* Lord Mostyn, 17 Jur. 1007; Smith *v.* Hurst, 1 Coll. 705; and see Greenway *v.* Bromfield, 9 Hare, 201.

(*a*) Smith *v.* Hurst, 1 Coll. 705; see 1 & 2 Vict. c. 110, s. 13; and see s. 14; and Bristed *v.* Wilkins, 3 Hare, 235, as to the creditor's remedy during the six months limited by that section.

749. Under the sheriff's act in Ireland (*b*) (**1317**), a judgment creditor, or person entitled to issue execution in a proceeding on any recognizance there, may apply by petition for a receiver, or for the extension of a receiver already appointed, over the whole of the rents of the lands, tenements or hereditaments, which are subject to his right of execution; and a receiver may thereupon be appointed over the whole or a sufficient part of the estate. The petition is to state the judgment or recognizance, and the sum due thereon, and also (*c*) the date and amount due on the foot of any decree or order for payment of any sum of money, costs, charges or expenses, in respect of which a receiver shall be applied for; and it must be verified by the affidavit of the person entitled, or such other affidavit as the court shall direct, stating the sum due for principal, interest and costs, over and above all fair and just allowances; and the court may require proof by affidavit or other evidence of the particulars and annual rental or value of the lands over which the receiver is sought.

The receiver is to apply (*d*) all sums which he shall receive according to the order of the court, which may extend the receiver from the matter of one creditor's petition to that of any other, and order the rents and profits to be applied according to the priority of each, as ascertained by the date of the entry of the judgment or inrolment of the recognizance; and in case of the death of any of the parties in the matter the court may make an order on motion for continuing the proceedings, in the name of or against the real or personal representatives, assignees or other persons in whom the interest of the deceased party has vested, or who claim the same, unless cause be shown to the contrary.

The tenants are required to pay to the receiver all the rents due or to become due in respect of the lands mentioned in the order. And the receiver is to receive no rents before the enrolment of the recognizance, which is unaffected by the extension of the receivership (*e*).

The receiver is to account once a year, and the person for

(*b*) 5 & 6 Will. 4, c. 55, s. 31.
(*c*) 3 & 4 Vict. c. 105, s. 27.
(*d*) 5 & 6 Will. 4, c. 55, s. 32.
(*e*) Sect. 33.

whose benefit he is appointed or continued, will be chargeable for any loss incurred by the receiver's neglect to account, if he have not taken the necessary proceedings to compel him to do so; which proceedings may also be taken by any person interested in the matter (*f*) (802).

750. The Court of Chancery in Ireland, in carrying out this act, adopted the mode of appointing a receiver by orders conditional and absolute; but it was by the absolute order that the rents were held to be bound; though the Court of Exchequer, by reason, it seems, of some difference in its practice as to the appointment, considered the rents to be bound from the date of the conditional order. A receiver was therefore discharged (*g*) in Chancery, where the order absolute was made after the debtor had committed an act of bankruptcy, the creditor being held not to have, before that time, an execution executed.

751. Monies received by the receiver, before an order of extension (sect. 31), are distributable as if no such order had been made; but in distributing monies afterwards received, the court has regard to the rights of those at whose instance the extension order was made, and may direct payment out of the funds collected by the receiver of the costs incurred in procuring his appointment, without regard to the priority of the person on whose application the appointment was made (*h*). But where an extension order is made, the monies received will still be applicable according to the legal rights of the parties. Therefore (*i*), where an annuitant on a life estate had obtained a receiver over the whole property, and an extension order was made in favour of a judgment creditor, whose demand affected the inheritance, the latter was considered to be an original appointment, and the judgment creditor was held entitled to levy the whole of the rents against the annuitant, who was in no better position than the *tenant for life, through whom* he claimed. The course, in such a case, seems to be to procure the discharge of the

(*f*) Sects. 34, 35.

(*g*) Burt *v.* Bernard, 3 Dru. & War. 464.

(*h*) Sect. 38.

(*i*) Corbet *v.* Mahon, 2 Jo. & Lat. 671.

order appointing the receiver over the whole of the lands, and to limit his appointment to so much as may be thought proper.

752. By 3 & 4 Vict. c. 105 (*k*) (Ireland), any person entitled to sue out an elegit or to issue execution in any suit or proceeding on any recognizance, may apply by petition to the Court of Chancery for a receiver over any lands, tenements, rectories, tithes, annuities, rents or hereditaments by the act made liable to be seized, extended, appraised or taken in execution on any such judgment, and also (after a charging order shall have been obtained (*l*)) all government stock, funds or annuities, or shares in any public company, or the dividends or proceeds thereof to which the judgment creditor or any person in trust for him may be entitled; and the receiver may be appointed or extended under the sheriff's act, or the present act, in a summary way, on petition, over any property of the judgment debtor which could be made available by such creditor for the payment of the judgment debt, by filing (after issue and return of a writ of execution at law upon such judgment) a bill in equity, or by any writ of execution at law, or (subject to the proviso therein referred to) by petition under the act; and the court may appoint or extend a receiver accordingly over the whole or so much thereof as shall appear sufficient for discharging the sum due on the judgment or recognizance; and every such petition shall state the judgment or recognizance and the sum due thereon, and shall be verified by the affidavit of the person interested, or by such other affidavit as the court shall direct, stating the sum due for principal, interest and costs over and above all just allowances; and the court may require proof by the affidavit of the applicant or otherwise of the particulars of the property, and the nature, value and situation thereof; and the proceedings may be continued by or against the representatives of the persons originally interested or liable, in the same manner as under the sheriff's act; and no petition is necessary or proper under either act to obtain an order after an order shall have been made on the first petition presented in such matter.

(*k*) Sect. 21.

(*l*) Sects. 23, 24.

753. By another act (*m*), when the Court of Chancery in Ireland by any law, practice or statute is empowered to appoint a receiver over real estate for the payment of any charge thereon, it may have regard to the amount of the charge, the rental of the estate, and the other remedies and securities, if any, of the creditor, and other circumstances, and may decline or postpone appointing a receiver, if it shall be of opinion that the appointment is unnecessary or inexpedient, or would not be of substantial benefit to the creditor; and the costs of the application are in the discretion of the court.

754. No receiver is to be appointed in respect of any judgment, or judgment mortgage, where the sum due thereon shall not exceed £150, nor where the rental of the estate shall not exceed £100 per annum. But this restriction does not apply to the extension of a receiver already appointed (*n*). Nor does the act affect the jurisdiction of the court to appoint receivers for the payment of tithes or tithe rent-charge (*o*).

755. Under the sheriff's act the court refuses to appoint a receiver against a prior elegit creditor in possession, and the petitioner must be in a position to sue out an elegit (*p*). But the existence of a prior legal security is no bar to the appointment, unless the prior mortgagee either holds or will take possession (*q*), though it will be made without prejudice to his right. Nor will it be prevented by a mere allegation that the judgment or security upon which the application is founded is fraudulent (*r*). It has been said that it should be refused where there is a clear equity to restrain the judgment creditor from proceeding at law, or where his right to proceed at law is not clear (*s*); but it was afterwards determined that the order ought to be made if the petitioner has a

(*m*) 19 & 20 Vict. c. 77, s. 2. By sect. 5 of this act, the Mortgage Act (Ireland), 11 & 12 Geo. 3, c. 10, is repealed.

(*n*) Sect. 3.

(*o*) Sect. 4.

(*p*) Hobson *v.* Murphy, 2 Jo. 169; Kennedy, pet., Whitney, resp., Sau. & Sc. 375.

(*q*) Smith, pet., Egan, resp., Sau. & Sc. 238.

(*r*) Maxwell, pet., O'Dell, resp., Sau. & Sc. 194.

(*s*) Kenny *v.* Clarke, 5 Ir. Eq. R. 284; Whaley *v.* Clarke, id. 444.

clear right to issue an elegit and proceed to execution, and that an equitable defence, though it be one of the sufficiency of which, when properly enforced, the court has no doubt, ought not to be admitted against the appointment of a receiver under the act. But the court retained the fund to give time to establish the equitable defence (*t*).

756. An application ex parte for a receiver under the sheriff's act is not a lis pendens affecting a purchaser (*u*) (**1158**).

Of what Property a Receiver may be appointed.

757. A receiver may generally be appointed over any property, real or personal, which may be taken in execution at law (upon an analogy to which remedy the creditor's right to a receiver is founded) (*x*), or which is assets in equity. And even a Government pension (*y*), or office under the Crown (*z*) (**385**), may be the subject of a receivership, provided the profits be payable out of some certain fund; for otherwise (as in the case of the salary in the nature of fees attached to an office held under the Treasury, and paid out of a sum annually voted by Parliament for a particular purpose, and for which no action could be maintained) (*a*) there can be no receiver. So there can be no receiver of rates, which are to be assessed and collected at a future time; for until the assessment there is nothing to collect (*b*): but there may be of the tolls of turnpike roads, or of canal and railway companies, or the like, because these are fixed payments in the nature of rent (*c*). And this, where the mortgages are complete in the

(*t*) Walsh *v.* Keane, 11 Ir. Eq. R. 426.

(*u*) Tenison *v.* Sweeny, 1 J. & L. 710.

(*x*) 1 Sw. 83. Receiver and manager of a newspaper till hearing of cause, he undertaking to print, publish and edit the paper, and forthwith to register himself proprietor according to the statute. (Chaplin *v.* Young, 6 L.T. (N.S.) 97.)

(*y*) Noad *v.* Backhouse, 2 Y. & C.C. C. 529. And it appears that no order on the Lords of the Treasury is necessary. (See M'Carthy *v.* Goold, 1 Ba. & Be. 387.)

(*z*) Blanchard *v.* Cawthorne, 4 Sim. 566.

(*a*) Cooper *v.* Reilly, 2 Sim. 560; 1 R. & M. 560.

(*b*) Drewry *v.* Barnes, 3 Russ. 94.

(*c*) Dumville *v.* Ashbrooke, 3 Russ. 98, n.; and see Knapp *v.* Williams, 4 Ves. 430, n.; 3 Russ. 105; Potts *v.*

ordinary form (*d*), though the act give special powers to the mortgagees, whose interest is in arrear (without prejudice to their other rights and remedies), to obtain a receiver: and to holders of debentures of public companies, the appointment of a receiver has been the only equitable remedy open, the right of sale or foreclosure having in the public interest been denied (*e*) (406). And note, that where a public undertaking is carried on by trustees or others empowered by statute, the appointment of a receiver does not supersede the powers of the act, or make the future management illegal, as being carried on by unauthorized persons. The management remains in its original hands, and the receiver does no more than pay the expenses, and apply the surplus proceeds under the order of the court (*f*), which generally declines to appoint a manager over a public undertaking (*g*); though under a late statute it is empowered to do so in the case of railway companies, as a substitute for the remedy by execution against the rolling stock and plant of the company, which is temporarily taken from the judgment creditor (*h*) (620). But a mortgagee of the rates and tolls of an undertaking has no right to a receiver against a claimant of the lands of the company, though the tolls arise out of such lands, and though a judgment creditor, by taking the lands, may altogether prevent the raising of the tolls (*i*).

Warwick and Birmingham Canal Navigation Company, Kay, 142; Ames *v.* Trustees of Birkenhead Docks, 20 Beav. 332; Lord Crewe *v.* Edleston, 1 De G. & J. 93; 3 Jur. (N. S.) 128, 1061; De Winton *v.* Mayor of Brecon, 26 Beav. 533.

(*d*) Fripp *v.* Chard Railway Company, 17 Jur. 887; 11 Hare, 241.

(*e*) Furness *v.* Caterham Railway Company, 25 Beav. 615.

(*f*) Ames *v.* Trustees of the Birkenhead Docks, 20 Beav. 332.

(*g*) Gardner *v.* London, Chatham and Dover Railway Company, L. R., 2 Ch. App. 201.

(*h*) Railway Companies Act, 1867, 30 & 31 Vict. c. 127, s. 4. As to the receiver to be appointed under sect. 54 of the Companies Clauses Consolidation Act, see Russell *v.* East Anglian Railway Company, 3 Mac. & G. 125. And as to the right of a judgment creditor of a corporation to a receiver upon property acquired by the corporation after the Municipal Corporation Acts, see Arnold *v.* Mayor of Gravesend, 2 Jur., N. S. 703. And as to the right of a mortgagee after the Corporation Act against a receiver appointed at the suit of a judgment creditor whose debt originated before the act, see Arnold *v.* Mayor of Gravesend, id. 706.

(*i*) Perkins *v.* Deptford Pier Company, 13 Sim. 277; and see a some-

A judgment creditor of the land may, however, be allowed to use his remedy, subject to the rights of a receiver already appointed over the rates and tolls, and subject to the rights of the public, where the public has any interest, under the constitution of the company (*j*).

758. The question as to the profits arising from the fellowship of a college has been the subject of conflicting decisions (**392**). Upon one occasion (*k*), a motion for a receiver was dismissed with costs; but in a later case (*l*), the court held that there might be a receiver, both of past and future appropriations, in respect of the profits of a fellowship of the same college; the duties being so slight, that no question of public policy could interfere with the validity of the assignment. And so it has been held (*m*), as to the canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence, and of attendance on divine service, the performance of which duty by the canon is of no benefit to the public.

759. The law is otherwise where the payment is to enable the grantee to perform future duties (*n*), as in the case of the half-pay of officers and others in the public service, the alienation of whose stipends would prevent prompt attention to their duties when required (*o*) (**387**). So as to a pension for the support of a dignity, granted as a memorial of and reward for great public services (*p*): though the latter decision seems to have turned considerably upon the language of the statute, which expressly made the receipts of the grantee and his successors proper discharges for the pension. But over

what similar point, but turning upon the words of the Companies Clauses Consolidation Act, and of the special act, in Russell *v.* East Anglian Railway Company, 3 Mac. & G. 125.

(*j*) Potts *v.* Warwick and Birmingham Canal Navigation Company, Kay, 142; see Gray *v.* Chaplin, 2 Russ. 126.

(*k*) Berkeley *v.* King's College, 10 Beav. 602.

(*l*) Feistel *v.* King's College, 10 Beav. 491.

(*m*) Grenfell *v.* Dean and Canons of Windsor, 2 Beav. 544.

(*n*) 1 Sw. 79. In Palmer *v.* Vaughan, 3 Sw. 173, the question was not decided as to the profits of the office of clerk of the peace, which, it was also argued, is an office touching the administration of justice within 5 & 6 Edw. 6, c. 16 (**385**).

(*o*) 2 Beav. 549.

(*p*) Davis *v.* Duke of Marlborough, 1 Sw. 74.

pensions which may be lawfully assigned a receiver will be appointed (*q*).

760. There cannot now be a receiver of the profits of an ecclesiastical benefice, because direct charges upon such property are prohibited by 13 Eliz. c. 20; and no indirect charges thereon by way of judgment, under 1 & 2 Vict. c. 110, s. 13, are of any force (*r*) (**393**).

Where the validity of the assignment is doubtful, the court may appoint a receiver without prejudice to that question (*s*).

761. A receiver or manager of mines may be appointed at the instance of one of several part owners, because of the peculiar nature of the property and the difficulty of management, where each owner claims a separate right of working; a mine being considered in this respect to be in the nature of a trade (*t*); but not against a mortgagee on the ground of mismanagement by omitting (*u*) to lay out more than a prudent owner would advance, though a larger expenditure would be likely to benefit the mine (**1610**). No receiver will be appointed in ordinary cases of lands belonging to tenants in common, unless (*x*) one of them be in possession of the whole of the rents (**742**).

762. A receiver may be appointed over a colonial estate (*y*); and as well over property of a personal kind as over the rents, profits and produce of realty, in a dependency or foreign country; and he will be authorized, if it be found expedient, to appoint an agent (with the approbation of the judge (*z*)) in the foreign country, power being given to execute the necessary instrument to enable such agent to act (*a*). As to property which is out of the jurisdiction the

(*q*) Heald *v.* Hay, 3 Gif. 467; 8 Jur. (N. S.) 379.

(*r*) Hawkins *v.* Gathercole, 1 Jur. (N. S.) 481.

(*s*) Palmer *v.* Vaughan, 3 Sw. 173.

(*t*) Jefferys *v.* Smith, 1 Jac. & W. 298.

(*u*) Rowe *v.* Wood, 2 Jac. & W. 553.

(*x*) Holmes *v.* Bell, 2 Beav. 298.

(*y*) See Barkley *v.* Lord Reay, 2 Hare, 308.

(*z*) Set. 560, ed. 2; 1038, ed. 3.

(*a*) Hinton *v.* Galli, 24 L. J. (Ch.) N. S. 121; see Toller *v.* Carteret, 2 Vern. 494. As to order for receiver in England of Irish estates, see Houlditch *v.* Donegal, 8 Bli. (N. S.) 343; 2 Will. 4, c. 33; 4 & 5 Will. 4, c. 82; and see 2 Sw. 325, n.

receiver will recover possession of it according to the laws of the country in which it is found (*b*).

Where the estate was in a distant dependency, the court, with the view of retaining its power over the receiver, ordered the appointment of a person in this country, who might appoint his own agent in the country where the estate was situate (*c*); but in the case of an executor, where there are assets abroad, the court will appoint a receiver in the foreign country, who shall find sureties in England, and so relieve the receiver from all responsibility with respect to his agent (*d*).

At what Stage of the Cause the Appointment may be made.

763. It has long been settled (*e*) that a receiver may be appointed before answer, if sufficient merits, that is to say, a clear equitable title in the applicant (*f*) be shown by affidavit; especially if the mortgagee is likely to be prejudiced by any delay in the appointment (*g*). And it has been held, that after answer the pendency of a plea to the original bill does not prevent the hearing of a motion for a receiver (*h*), though, as a general rule, a motion or other proceeding cannot be made or taken pending a plea (*i*).

764. The receiver may also be appointed before appearance of the owner of the equity of redemption, if, but not unless, from the state of the security, or other urgent circumstances, an immediate appointment be necessary (*k*); and even before service of the copy bill, if the defendant have ab-

(*b*) Smith *v.* Smith, 10 Hare, 71.

(*c*) ——— *v.* Lindsay, 15 Ves. 91.

(*d*) Cockburn *v.* Raphael, 2 Sim. & St. 453.

(*e*) Vann *v.* Barnett, 2 Bro. C. C. 158; Compton *v.* Bearcroft, Trin. 1773, cited there; Jervis *v.* White, 6 Ves. 738; Middleton *v.* Dodswell, 13 Ves. 266; Duckworth *v.* Trafford, 18 Ves. 283; Davis *v.* Duke of Marlborough, 1 Sw. 74; 2 id. 138, n.: see Scott *v.* Becher, 4 Price, 346; semble also Dawson *v.* Yates, 1 Beav. 301.

(*f*) Metcalfe *v.* Pulvertoft, 1 V. & B. 180; see Dawson *v.* Yates, supra. By analogy, it seems, to the legal incumbrancer's right of ejectment; 2 Sw. 138, n.

(*g*) Aberdeen *v.* Chitty, 3 Y. & C. 379; and see Woodyatt *v.* Gresley, 8 Sim. 180.

(*h*) Thompson *v.* Selby, 12 Sim. 100.

(*i*) Dan. Pr. Headl. 659; Buchanan *v.* Hodgson, 11 Beav. 368.

(*k*) Meaden *v.* Sealey, 6 Hare, 620; and see Hart *v.* Tulk, id. 611; Caillard *v.* Caillard, 25 Beav. 512.

sconded (*l*), and his residence be unknown. It was also admitted to be good reason for such an appointment that the defendant was out of the jurisdiction (*m*); for otherwise such a residence might be fatal to the security. But unless the defendant's residence be unknown, or the circumstances be urgent, the mere fact of absence beyond the jurisdiction seems to be no longer a reason for appointing a receiver before service of the bill; for an order may now be made for good service abroad (*n*); and upon an application since the statute for a receiver, before service on an absent defendant, the court did not make the appointment on the ground of absence, but because the person in actual possession was before the court; the absent defendant being one of two tenants in common, the other of whom was in possession of the whole of the rents (*o*).

If a defendant have made an affidavit in the cause, although no formal appearance be entered, he shall be considered to have appeared, for the purpose of appointing a receiver (*p*).

765. A receiver may be appointed at the hearing, though none be prayed by the bill, if the facts stated are sufficient to authorize the appointment (*q*), but not on the defendant's application, except, perhaps, on petition (*r*), or after decree, without filing a supplemental bill, in cases of urgency (*s*); as where a person not a party to a cause had been so long in possession without accounting, that there was danger of his acquiring an absolute title by adverse possession (*t*); or where

(*l*) Dowling *v.* Hudson, 14 Beav. 423; Pitcher *v.* Hellier, 2 Dick. 580; Maguire *v.* Allen, 1 Ba. & Be. 75; see Arthurs *v.* Arthur, 1 Hog. 95.

(*m*) Tanfield *v.* Irvine, 2 Russ. 149; Coward *v.* Chadwick, id. 150, n., 634; Gibbins *v.* Mainwaring, 9 Sim. 77; see Noad *v.* Backhouse, 2 Y. & C. C. C. 529.

(*n*) 2 Will. 4, c. 33 (1832); 4 & 5 Will. 4, c. 82 (1834); X. Cons. Ord. s. 7; Carwardine *v.* Wishlade, 15 Jur. 913; Thomas *v.* Colsworth, 14 Beav. 208; and see 15 & 16 Vict. c. 86, s. 33.

(*o*) Holmes *v.* Bell, 2 Beav. 298.

(*p*) Vann *v.* Barnett, 2 Bro. C. C. 158.

(*q*) Malcolm *v.* Montgomery, 2 Mol. 500; Osborne *v.* Harvey, 1 Y. & C. C. C. 116; though Kindersley, V.-C., seems to have thought otherwise; 3 Drew. 120.

(*r*) Barlow *v.* Gains, 8 Beav. 329.

(*s*) Bowman *v.* Bell, 14 Sim. 392; Thomas *v.* Davies, 11 Beav. 29; Wright *v.* Vernon, 3 Drew. 112.

(*t*) Thomas *v.* Davies, supra.

the mortgagee in possession, not showing clearly that any thing was due upon his prior mortgage (733), the next security (being on a life estate) was in danger of being lost by the delay, and the possible inability of the first mortgagee to refund, if he should be ordered to do so (*u*).

So, if it appear by the report, that the circumstances would, at the hearing, have entitled the party to a receiver; as if a balance be *shown* to be in the hands of the mortgagee (*x*), or if the defendant, by neglecting to bring in the deeds, has prevented the plaintiff from obtaining the benefit of a decree for sale (*y*). But not, it seems, after decree, where no subsequent circumstances have made it necessary for the protection of the estate or otherwise (*z*).

The appointment may be made after decree, although, by the decree, further consideration generally (*a*), or the matters in question between the plaintiff and the particular defendant (*b*), have been reserved; such questions not being affected by the appointment.

A receiver may be ordered after decree for sale and administration, against the executor who has neglected to get in part of the estate (*c*).

It has been held in Ireland, that, after a decree taken pro confesso, the application for a receiver must be supported by an affidavit as to the sum due for principal, interest and costs, after all just allowances, and that the defendant is in possession (*d*).

Before the hearing of the cause the court will not hear a motion for a receiver founded upon evidence which has been taken in the cause (*e*).

Of the Persons who may be appointed.

766. The person who is to fill the office of receiver is generally selected in proceedings in the judge's chambers; but if

(*u*) Hiles *v.* Moore, 15 Beav. 175.

(*x*) A.-G. *v.* Mayor of Galway, 1 Mol. 95—104.

(*y*) Harris *v.* Shee, 6 Ir. Eq. R. 543; 1 J. & L. 91.

(*z*) Wright *v.* Vernon, 3 Drew. 112; and see Hackett *v.* Snow, 10 Ir. Eq. R. 220.

(*a*) Hiles *v.* Moore, 15 Beav. 175.

(*b*) *Cooke v. Gwyn, 3 Atk. 689.*

(*c*) *Re Bywater, 1 Jur., N. S. 227.*

(*d*) Rogers *v. Newton, 2 Ir. Eq. R.* 40.

(*e*) Lloyd *v.* Passingham, 3 Mer. 697.

both parties can agree upon a proper person, the court will at once insert his name in the decree (*f*). He should be a person, who, consistently with his professional or other pursuits, can spare sufficient time for the duties of the office; and the court will attend to circumstances, tending to show that the person proposed is unable to fulfil this condition, and has, therefore, held (*g*) it to be a ground, not for absolute rejection, but which made further consideration proper, that the proposed receiver was both a member of parliament and a practising barrister; but to the appointment of a practising barrister (*h*), not being a member of parliament, there is no objection.

It appears, however, that a person who fills the latter character is ineligible upon other grounds. The court does not appoint persons to the office of receiver, whose privileges protect them from the ordinary remedies which it may become proper to enforce (*i*); and a peer is therefore disqualified. Lord Eldon, indeed, would not say (*h*), that a member of the House of Commons was absolutely disqualified; being unwilling, perhaps, to lay down a rule, from which it might be inferred, that he did not think such a person amenable to the process of the court. But it appears clear (*l*) that members of the House of Commons are protected from process for contempts of a civil kind, such as would be that incurred by a receiver for disobedience to the orders of the court, though they are liable for criminal contempts, such as the clandestine removal and concealment of a ward of court, or an act injurious to the administration of justice. Whence it seems that they ought not to be appointed receivers.

Nor will any person be chosen whose position may cause difficulty in administering justice, as formerly Masters of the court (*m*); lest there should be a bias in the minds of those whose duty it is to pass the accounts, and because it is by

(*f*) Anderson *v.* Kemshead, 16 Beav. 329; Powys *v.* Blagrave, 18 Jur. 464.

(*g*) Wynne *v.* Lord Newborough, 15 Ves. 283.

(*h*) Garland *v.* Garland, 2 Ves. jun. 137; Wilkins *v.* Williams, 3 Ves. 588.

(*i*) A.-G. *v.* Gee, 2 Ves. & B. 208.

(*h*) 15 Ves. 284.

(*l*) Long Wellesley's case, 2 R. & M. 639; Lechmere Charlton's case, 2 M. & C. 316.

(*m*) Ex parte Fletcher, 6 Ves. 427.

these officers that the receiver himself ought to be checked. The same principle, no doubt, disqualifies the chief clerks of the judges, and has been extended to the solicitor in the cause, or acting under a commission of lunacy (*n*), though generally there is no objection to the appointment of a solicitor (*o*).

So a person who is under security to the Crown, as the receiver-general of a county (*p*), is not eligible, because his whole property may be swept away by the Crown, and the debt to the estate lost.

The like has been held (*q*) of the next friend of an infant plaintiff, who will not be appointed, even by consent of the other party, because it is his duty to control, and to check the accounts of the receiver: and even the son of a next friend has been rejected (*r*).

The same principle applies to a trustee, whether sole, or joint, where he is an accounting party (*s*). And a further reason in this case is, that a trustee ought to derive no advantage from his trusteeship (*t*). Thus, a trustee, with power to lease during the minority of the tenant for life, is within this latter rule; the good of the inheritance being his duty, and the increase of the income his interest (*u*). And the court will even remove (*x*) a receiver whose private interests are in conflict with his duties, though his acts have for the most part been for the general good of the property, and though a majority, both in number and value, of the incumbrancers desire that he should be retained.

But a trustee to preserve contingent remainders, or with powers of sale and exchange, which cannot be immediately exercised, may be appointed (*y*); and sometimes the appointment of a trustee may be beneficial, as where he has a peculiar knowledge of the estate, or no other person can be found. But a trustee in such cases must act without emolument (*z*).

(*n*) Garland *v.* Garland, 2 Ves. jun. 137; Ex parte Pincke, 2 Mer. 452.

(*o*) See Della Cainea *v.* Hayward, M'Cl. & Y. 272.

(*p*) A.-G. *v.* Day, 2 Mad. 246.

(*q*) Stone *v.* Wishart, 2 Mad. 64.

(*r*) Taylor *v.* Oldham, Jac. 529.

(*s*) Anon., 3 Ves. 515; —— *v.* Jolland, 8 Ves. 72.

(*t*) Sykes *v.* Hastings, 11 Ves. 363.

(*u*) Sutton *v.* Jones, 15 Ves. 584.

(*x*) Fripp *v.* Chard Railway Company, 17 Jur. 887; 11 Hare, 241.

(*y*) Sutton *v.* Jones, supra.

(*z*) Sykes *v.* Hastings, 11 Ves. 363; Hibbert *v.* Jenkins, cited there.

Upon which condition, a testamentary guardian (*a*), or tenant for life (*b*), or other person immediately interested in the estate (*c*), may be appointed. Or liberty may be given to parties to the suit, to propose themselves (*d*).

Upon the ground that he cannot have any benefit beyond his contract, the mortgagee of a West India estate who does not take possession will not be appointed consignee, unless he has stipulated for the advantage (*e*) (**204, 356**).

767. Where there is an equitable tenant for life, the court will give the preference to the person proposed by him, being otherwise a proper person (*f*). So the receiver proposed by the mortgagee will not be rejected, if there be no personal objection to him, though a person proposed by the mortgagor may be more experienced in the duties of the office (*g*).

Of the Authority of the Receiver.

768. It is a general rule, that the receiver should do no act which may involve the estate in expense without the sanction of the court. Therefore he cannot of his own authority bring ejectment (*h*); and if there be two receivers, both acting under the authority of the court, one of them ought not to take possession against the other; but he, or those at whose instance he was appointed, should seek the directions of the court (*i*).

Nor is it proper for the receiver to defend actions brought against him in respect of the estate, without the sanction of the court; especially if they arise out of acts improperly done by the receiver of his own authority; and if he be unsuccessful he will not be allowed the costs of such actions (*k*). But if he succeed without putting the estate to the expense of an application, which he might have made for his own security, he has the same right to be indemnified as if he had applied to the court (*l*).

(*a*) Gardner *v.* Blane, 1 Hare, 381.
(*b*) Powys *v.* Blagrave, 18 Jur. 462.
(*c*) Hoffman *v.* Duncan, 18 Jur. 69.
(*d*) Meaden *v.* Sealey, 6 Hare, 620.
(*e*) Cox *v.* Champneys, Jac. 576.
(*f*) Baylies *v.* Baylies, 1 Coll. 537; Edwards *v.* Kennedy, V.-C. Wood, Dec. 1853.
(*g*) Wilkins *v.* Williams, 3 Ves. 588.
(*h*) Wynn *v.* Lord Newborough, 3 Bro. C. C. 87.
(*i*) Ward *v.* Swift, 6 Hare, 312.
(*k*) Swaby *v.* Dickon, 5 Sim. 631.
(*l*) Bristowe *v.* Needham, 2 Ph. 190.

A motion to restrain a receiver from doing acts not within his authority will be rejected with costs, if made by persons who have (*m*) no interest to support it; as the tenants of the estate.

769. It seems (*n*) that the receiver may distrain, at his own discretion, for rent which has accrued within the year; but if more than a year's rent be behind, the order of the court should be obtained. It appears to have been a constant practice of receivers to come to the court, in all cases, on the ground that the distress must be in the name of the owner of the legal estate; but this was said by Lord Hardwicke (*o*) to be unnecessary and inconvenient, because the tenant has an opportunity of removing his goods; and the court does not make an immediate order, but allows a future day: if, however, the legal right be doubtful it would be proper to come to the court. The proper course is, to make the tenants attorn to the receiver, in whose name the distress may then be made (*p*). This will be ordered on motion, and if the tenants oppose on the ground of the pendency of an action commenced before the appointment of the receiver, for the same rent, the motion will be ordered to stand over until the action has been tried. The costs are not given against the tenants in such a case, but it is presumed that they would be subjected to costs, if an improper opposition were made to the motion (*q*). The attornment creates a tenancy by estoppel between the tenant and the receiver only, and none between the tenant and the person entitled to the legal estate, so as to enable the latter to distrain (*r*).

770. Where the person in possession refuses to deliver possession to the receiver, it is not necessary in the first instance to make him a party to the suit by reason of its not appearing

(*m*) Wynn *v.* Lord Newborough, 3 Bro. C. C. 87.

(*n*) Brandon *v.* Brandon, 5 Mad. 473.

(*o*) Pitt *v.* Snowden, 3 Atk. 750; see Mitchell *v.* Duke of Manchester, 2 Dick. 787. Order for tenant who had not attorned to pay arrears and costs. (Hobson *v.* Sherwood, 19 Beav. 575.)

(*p*) Hughes *v.* Hughes, 1 Ves. jun. 161; 3 Bro. C. C. 87; and the decision of Lord Northington, cited 1 Dick. 120, n.

(*q*) Hobhouse *v.* Hollcombe, 2 De G. & S. 208.

(*r*) Evans *v.* Mathias, 3 Jur. (N. S.) 793.

what is the nature of his interest; but the common direction being, that the tenants shall attorn, the court treats the person in possession as a tenant (*s*); and the course is to move that he may attorn, and the motion will be allowed to stand over, that he may inform the court, whether he be a tenant or not; but unless he show the contrary, it will be assumed, it seems, that he is a tenant, and he will be ordered to attorn accordingly.

Where the person in possession does not hold as a mere tenant, the court will order that possession be given to the receiver (*t*); and, if it be refused, the receiver will be put into possession by the ordinary process of the court; viz. (*u*) by writ of assistance, directed to the sheriff, an order for which may be obtained on motion after due service of the decree or order for delivery of possession, and upon proof of demand and refusal to obey such order; and it is sufficient (*x*), if the affidavit show a refusal during the whole of the time limited by the order for delivery of possession, without showing also a refusal up to the time of making the motion.

771. The court will also on the petition of the lord order delivery of the court rolls to the receiver by the steward, who holds them only as the lord's agent (*y*).

772. Where a plaintiff, upon whose application the receiver had been appointed, was proceeding both at law and in equity, the court would not give leave to the receiver to distrain upon the tenants, unless the plaintiff would undertake to proceed in equity only; because the tenants might file bills of interpleader (*z*).

773. It is said to have been ordered (but the decision is queried by the reporter) (*a*), that a receiver might distrain in the names of trustees, both for arrears and as there should be occasion. But the court is slow to invest a receiver with in-

(*s*) Reid *v.* Middleton, T. & R. 455.

(*t*) Griffith *v.* Griffith, 2 Ves. 401; Davis *v.* Duke of Marlborough, 2 Sw. 108—116, and form there.

(*u*) Ferguson *v.* Tadman, cited 2 Sim. 401; Green *v.* Green, id. 394; XXIX. Cons. Ord. s. 5; see Lord Bac. 9th Order, Beames, Ord. 6.

(*x*) Webster *v.* Taylor, 18 Jur. 869.

(*y*) Rawes *v.* Rawes, 7 Sim. 624.

(*z*) Mills *v.* Fry, Coop. 107. There was some doubt as to the form of the order, because the plaintiff having been already ordered to proceed at law or in equity, it was thought that, proceeding in equity, he had no longer a right to the benefit of the order to elect.

(*a*) Shelly *v.* Pelham, 1 Dick. 120.

dependent powers of taking proceedings, especially if he be a solicitor, or where there is a trustee of the estate; under which circumstances leave was refused to the receiver to bring actions against the consent and in the name of the trustee, against tenants in arrear, and from time to time with the approbation of the master to proceed against tenants in similar circumstances; and a reference was refused, as to the propriety of proceeding in the name of the trustee (*b*).

It is said that an order has been made, that tenants should attorn to sequestrators upon a sequestration for contempt for want of answer, but that the order was not of course, and the court refused to commit the tenants for not obeying the order (*c*).

774. The receiver being appointed for the management of the estate, it was at first the practice (*d*), and was afterwards ordered (*e*), that he should have power to let and set the estate with the approbation of the Master, who was empowered, without the special order of the court, to receive and to report on proposals from the parties interested, for the management or letting of the estate; but the practice was different in the case of a sequestrator, because his appointment is only temporary (*f*).

Where a receiver had been appointed over an estate, and had afterwards been directed to include, in his future accounts, the rents and profits of another estate which had been foreclosed, it was held that the Master might report upon the propriety of a proposed lease of that estate under the above order, without a special reference, though the receiver had not been specially appointed over it with power to let and set (*g*); and directions being now given upon these matters by the judges in chambers, the direction for the receiver to manage, let and set, is no longer inserted in the order of appointment (*h*).

775. The receiver ought not to let and set without the

(*b*) Della Cainea *v.* Hayward, M'Cl. & Y. 272.
(*c*) Rowley *v.* Ridley, 2 Dick. 622.
(*d*) Neale *v.* Bealing, 3 Sw. 304, n.
(*e*) 64th Order, April, 1828.
(*f*) Neale *v.* Bealing, supra; Ray *v.* ——, 3 Sw. 306, n.
(*g*) Duffield *v.* Elwes, 11 Beav. 590.
(*h*) Set. ed. 2, 543; ed. 3, 1016.

approbation of the court (*i*), even, it would seem, for a single year (*k*); but it appears that he may give a good notice to quit to a tenant from year to year (*l*); for a tenant having held over after such a notice, the Court of Chancery gave the receiver leave to sue for double rent.

He should move for liberty to let the estate before the old lease expires: and although if he neglect to do so he will be at liberty to make what he can of the estate during the current year, he will be visited with any loss which may arise (*m*).

To avoid the necessity for constant applications to the court, for permission to let a colonial estate, an inquiry may be directed beyond what term the receiver shall not be permitted to let (*n*).

The court, allowing no lease to be made which shall bind an infant remainderman, will not even inquire (*o*) whether it will be for the benefit of the parties interested, that the receiver should lease for any number of years, an estate which is settled upon one for life, with remainder over to an infant.

776. Where an estate has come into the possession of, and has been held by, the receivers in a cause, as tenants under an unauthorized lease, and with the acquiescence of such of the parties interested as were able to object, it will be held binding upon the receivers, and they will be ordered (*p*) to pay the arrears of rent, and will be responsible for the dilapidations, the amount of which particulars respectively will be ascertained by inquiry. And this will be done on the petition of the owners of the estate (though no parties to the suit), without driving them to file a bill; because the court will not study the form of doing justice in a matter arising out of a possession held by itself. In like manner, if a person have entered into an agreement with the court, it will use a sum-

(*i*) 1 Ves. jun. 139; Swaby *v.* Dickon, 5 Sim. 629.

(*k*) Wynne *v.* Lord Newborough, 1 Ves. jun. 164.

(*l*) See Wilkinson *v.* Colley, Bur. 2694.

(*m*) Wilkins *v.* Lynch, 2 Mol. 499.

(*n*) ——— *v.* Lindsey, 15 Ves. 91.

(*o*) Gibbins *v.* Howell, 3 Mad. 469.

(*p*) Neate *v.* Pink, 15 Sim. 450; 3 Mac. & G. 476.

mary remedy against him; and has therefore restrained on motion (*q*) a tenant, to whom the receiver had let the estate from year to year, from carrying off crops contrary to the custom of the country, though the tenant was no party to the suit. But the incumbrancer of an annuity, which the receiver was ordered to pay to the annuitant, was refused an order for payment of the annuity, on petition; for that he was a stranger to the suit, and there was no privity between him and the court, or the receiver as its agent (*r*).

777. If the tenant for life of a mortgaged estate, with power to lease, exercise the power *pendente lite*, and after the appointment of a receiver, the lessees are considered, as against prior incumbrancers on the estate, as tenants from year to year to the receiver; and, as such, are entitled to notice to quit. And the receiver may be ordered to let the estate without prejudice to their rights against their lessor, and to bring ejectment against them in case of their resistance to the new letting (*s*).

778. Where the court directs the receiver to give any particular person the option of being tenant, it reserves power to the receiver to inspect the state of the property (*t*).

779. The rents and profits of the estate are bound from the date of the order (*u*) for the appointment of the receiver; but he is not legally clothed with that character nor able to perform its duties, until his recognizances are perfected (*x*).

He is entitled to receive all rents in arrear at the date of his appointment (*y*), and a person, who admits a sum of money to be due from him to the estate, may not dispute the receiver's right to collect it (*z*). But produce which has been already separated from the estate, though not yet converted into money, does not belong to the receiver. Therefore (*y*) where a manager was appointed of a West India estate, with

(*q*) Walton *v.* Johnson, 15 Sim. 352; and see Casamajor *v.* Strode, 1 Sim. & S. 381.

(*r*) Wastell *v.* Leslie, 15 Sim. 453, n.

(*s*) Lord Mansfield *v.* Hamilton, 2 Sch. & Lef. 28.

(*t*) Baylies *v.* Baylies, 1 Coll. 548.

(*u*) Codrington *v.* Johnstone, 1 Beav. 520.

(*x*) Wickens *v.* Townshend, 1 Russ. & M. 361.

(*y*) Codrington *v.* Johnstone, supra.

(*z*) Wood *v.* Hitchings, 2 Beav. 289.

directions to receive and remit the rents and produce, the consignees were not ordered to pay into court the surplus monies arising from the produce of the estate which had been severed, and sent by the mortgagor to the consignees, but had not been received by them at the date of the order. Neither can the receiver claim rent from a person who, being in possession of the estate, has been ordered to pay an occupation rent, in respect of any period prior to such order; from the date of which only his tenancy and liability to payment of rent commences (*b*).

780. Where an estate is under sequestration, the landlord is entitled to rent, and by the equity of the statute of 8 Anne, c. 14, to arrears, not exceeding one year's rent; payment whereof will be ordered to be made out of the produce of the estate paid into court by the sequestrators (*c*).

781. When possession is taken by a prior incumbrancer, the balance which shall be found due from the receiver, upon passing his accounts, will be ordered to be paid by him to such prior incumbrancer.

782. When the receiver is informed that the defendant has interfered with the rents, he should move for an attachment; and it is sufficient if he swear that he had the information from the tenants, and that he believes it (*d*). The interference of the owner of the inheritance with the rents does not exempt the receiver from being charged with the whole amount, but he must discharge himself by showing what the inheritor received, or hindered him from getting (*e*).

783. Where money comes into the hands of a receiver, appointed in a foreclosure suit, at the instance of the plaintiff, and no particular directions have been given for its application, it belongs in the first instance to the plaintiff, who will be entitled (*f*) to receive it on the dismissal of the bill. And the order for payment may be made on motion after the suit is out of court by the dismissal of the bill (*g*). But

(*b*) Lloyd *v.* Mason, 2 M. & C. 487.
(*c*) Dixon *v.* Smith, 1 Sw. 457.
(*d*) Anon., 2 Mol. 499.
(*e*) Hamilton *v.* Lighton, 2 Mol. 499.
(*f*) Paynter *v.* Carew, 18 Jur. 417. The observations of the V.-C. seem to have been misunderstood by the reporter in Kay, xxxvi.
(*g*) Id.; and Wright *v.* Mitchell, 18 Ves. 292.

money in the hands of sequestrators against the estate of a defendant in contempt, are *in custodiâ legis*, and cannot, without a further order, be applied for the plaintiff's benefit. If incumbrancers come in for examination *pro interesse suo*, and obtain a certificate that they are prior mortgagees, they are entitled to have possession from the sequestrators; and to have the rents and profits, which have been received by the latter, applied in payment of their mortgage debt after paying the sequestrator's costs, and the costs of the application (*h*).

784. The court will not direct the receiver of an infant's estate to keep down the interest of mortgages, until the mortgages have been established, because this would be to assume that the debts were due (*i*).

Of the Receiver's Right to apply to the Court.

785. It has been laid down that, except in case of necessity, the receiver ought not to present a petition (*k*), or to originate any other proceeding in a cause (**813**). If an application to the court become necessary, the receiver should apply to the plaintiff, or probably to any other party to the suit at whose instance he may have been appointed, and if after he have done so no application be made, or no proper means be taken to relieve the receiver from his difficulty, he may apply himself, and will then be entitled to his costs. The rule extends to the case where the receiver is a co-petitioner and was referred to by the M. R. where a receiver joined in petitioning for his discharge (*l*): but the observations of Lord Langdale, in the cases cited above, seem to imply that this is a rule of practice at the Rolls, adopted by Sir John Leach, and since followed there, rather than a general rule, and it certainly appears that a different course has been elsewhere followed without observation (*m*).

(*h*) Walker *v.* Bell, 2 Mad. 21, and form of order; Tatham *v.* Parker, 1 Jur. (N. S.) 992; 1 Sm. & G. 506; and see 1 P. Wms. 308-9; 2 Dick. 622; Delany *v.* Mansfield, 1 Hog. 234; Warren *v.* Warren, 13 Ir. Eq. R. 69.

(*i*) Anon., 6 Mad. 9.

(*k*) Ireland *v.* Eade, 7 Beav. 55; Parker *v.* Dunn, 8 id. 497.

(*l*) Murray *v.* Earl of Scarborough, Rolls, 17 Nov. 1855.

(*m*) See Mills *v.* Fry, Coop. 107, before Lord Eldon; Wickens *v.* Townshend, 1 R. & M. 361, before Lord Lyndhurst; though it was only before the hearing, and not at the presenting

It is clear that if a party to the cause be appointed a receiver, he does not lose his privileges as a party, and may apply to the court as if he did not hold the office (*n*). And in some cases it is necessary that he should join in the proceeding. Thus, if the receiver pay money in his hands to the solicitors of the plaintiffs, who are also his own solicitors, without precise instructions as to the application of the monies, the money is considered to be paid to them as the solicitors of the receiver and not of the plaintiff; and the receiver must be a party to an application for payment of the money into court by the solicitors (*o*).

Of the Receiver's Possession.

786. The possession of the receiver is the possession of the court (*p*), without whose authority no man may interfere with the receiver, or with property of which he has taken, or has been directed to take, possession (*q*), either directly, by suing out execution, and taking possession against him, by attachment under the garnishee clauses of the Common Law Procedure Act, 1854 (*r*), or by ejectment (*s*), sequestration (*t*), or any other proceeding, whether of an ordinary kind, or authorized by statute (*u*), even though none of the profits be taken (*x*); nor will the receiver's possession be affected by notice given by the mortgagee to the tenants, to pay their rents to him (*y*). And whether the claimant knew, or not, of the appointment of a receiver, or however clear may be his title, he will be restrained from prosecuting his claim if he had not first obtained the leave of the court (*z*). And if he have commenced proceedings without leave, he will be obliged to discontinue

of the petition, that his character of receiver was complete. (Shaw *v.* Rhodes, 2 Russ. 539; Potts *v.* Leighton, 15 Ves. 274.)

(*n*) Crisp *v.* Platel, 2 Ph. 229.

(*o*) Chater *v.* Maclean, 1 Jur., N. S. 175.

(*p*) Russell *v.* East Anglian Railway Company, 3 Mac. & G. 104.

(*q*) Ames *v.* Trustees of Birkenhead Docks, 20 Beav. 353.

(*r*) De Winton *v.* Mayor of Brecon, 28 Beav. 200.

(*s*) Angel *v.* Smith, 9 Ves. 335; Anon., 6 id. 287; Evelyn *v.* Lewis, 3 Hare, 472.

(*t*) Hawkins *v.* Gathercole, 16 Jur. 650; 1 Drew. 12.

(*u*) Tink *v.* Rundle, 10 Beav. 318.

(*x*) Hawkins *v.* Gathercole, supra.

(*y*) Thomas *v.* Brigstocke, 4 Russ. 64.

(*z*) Evelyn *v.* Lewis, 3 Hare, 472.

them, and must with leave of the court commence de novo (*a*). Even, where there is a receiver (to whom the tenants have been ordered to attorn) over the rents and profits of copyholds, the lord may be restrained from an unauthorized proceeding in ejectment against a *terre tenant,* upon seizure *quousque* by the bailiff of the manor for want of a tenant (*b*). Whence it seems that the powers of the receiver override, in this particular, the rights of the lord; and it is the same as to the right of a lessor to recover on a forfeiture, where a receiver has been appointed over the lessee's interest (*c*).

Nor may the authority which has been exercised by the Court of Chancery in the matter be questioned, whether the appointment were proper or not, by calling upon the receiver to interplead in another court; but he, if so summoned, may properly appear, for the purpose of asserting his right, and denying the right of any other court than the Chancery to interfere with his possession (*d*); and if he improperly submit and pay the money, contrary to the order of the court, the person who has received it will be ordered to repay, and the receiver may become liable to the costs of the application. It is not necessary to wait for the passing of the receiver's accounts before applying to the court to prevent him from misapplying money in his hands (*e*).

787. The order of appointment must, however, be so distinct on the face of it, that it may be known of what property the receiver is in possession. Hence, where a receiver was appointed (*f*) of "the incomes of the outstanding property in the pleadings mentioned," under which order the receiver entered into, and remained, in possession of the real estate for several years, and the tenants attorned to him; an application to restrain the legal owner from proceeding against the tenants, without the leave of the court,

(*a*) Lees *v.* Waring, 1 Hog. 216.

(*b*) Evelyn *v.* Lewis, 3 Hare, 472.

(*c*) Wadmore *v.* Trevanion, 3 Hare, 473, cited; and see Potts *v.* Warwick and Birmingham Canal Navigation Company, Kay, 142.

(*d*) Russell *v.* East Anglian Railway Company, 3 Mac. & G. 104, 123; explaining Drewry *v.* Thacker, 3 Sw. 529; Woodward *v.* Earl Lincoln, 3 Sw. 626.

(*e*) De Winton *v.* Mayor of Brecon, supra.

(*f*) Crow *v.* Wood, 13 Beav. 271.

was refused with costs. The appointment should be over the rents of the particular property, and should be followed by a direction to the owner to deliver possession, or that the tenants should attorn (*g*).

788. There appears to be no direct authority for the committal of a sheriff for the act of his undersheriff, in seizing property which was in the possession of a receiver under the Court of Chancery, where the proceeding cannot be inferred to be the sheriff's personal act. But it is said, that in case of necessity, as where the public safety requires it, the sheriff himself may be committed. In the case cited (*h*), the sheriff and undersheriff having submitted, were ordered on appeal to withdraw, and to pay the costs and expenses of the seizure, and of the application against them in the court below.

The sheriff will also be restrained, if necessary, from compelling the receiver to interplead, and will be ordered to pay the costs of proceedings taken for that purpose; and if the execution creditor be before the court, he will be restrained from proceeding against the sheriff in relation to the property seized by the latter, or any other property in the receiver's possession. If the execution creditor be not before the court this cannot be done, but the sheriff can come to the court for protection if necessary.

And that the execution creditor may not suffer loss by the receiver's possession, in case it shall appear in proceedings taken by the creditor, that his right ought not to have been interfered with by such possession, the receiver may be ordered (*i*) to retain within the bailiwick, for fourteen days, goods, chattels and effects, equal in value to those seized by the sheriff, not exceeding what would be necessary to satisfy the levy in the writ of *fieri facias;* such value, if necessary, to be settled in the judge's chambers.

789. It may be observed here, that although a person cannot be committed for a breach of an injunction granted

(*g*) See Griffith *v.* Griffith, 2 Ves. 400; Davis *v.* Duke of Marlborough, 2 Sw. 116; Metcalfe *v.* Pulvertoft, Set. Dec., ed. 1, 316.

(*h*) Russell *v.* East Anglian Railway Company, 3 Mac. & G. 104.

(*i*) Id.

against another, to whose servants and agents the injunction does not extend, yet he may be committed for knowingly assisting in an act which the court has prohibited (*j*). No order *nisi* is necessary on an application to commit a person for taking forcible possession against a receiver (*k*).

The court uses its power of committal sparingly, and only when it is necessary to vindicate its authority; and will not sanction a motion to commit a person for disturbing a receiver's possession, when it is made long after the act complained of, and not for the protection of the receiver's possession, but to compel payment of his expenses after the question relating to the possession is settled. The proper course is to make such a direct application for the costs, as is warranted by the circumstances (*l*).

Where a receiver, appointed by the court, committed waste in the long vacation, and the parties concerned thereupon discharged him, the court refused, under the circumstances, to grant an attachment against them for thus removing him (*m*).

790. The sheriff who levies under a *fieri facias* issued by the Court of Chancery, under 1 & 2 Vict. c. 110, is not entitled to the protection of the court, against an action by strangers to the suit, claiming the articles seized; for he is not an officer of the court, though he fills the place which, under the former practice, would have been occupied by the sequestrator. No question arises as to an inquiry at law into the process of the court, and the statute provides no protection for the sheriff (*n*).

791. The court gives leave to a person, who claims an interest in real or personal property paramount to that of a receiver, or of a sequestrator, to bring ejectment, or to come in and be examined *pro interesse suo*; or an inquiry may be directed as to the claimant's interest in the property (*o*). And

(*j*) Lord Wellesley *v.* Lord Mornington, 11 Beav. 180, 181.

(*k*) Broad *v.* Wickham, 4 Sim. 511; notwithstanding Van *v.* Price, 1 Dick. 91; Williams *v.* Johns, 2 id. 477; and see Davies *v.* Cracraft, 14 Ves. 143.

(*l*) Ward *v.* Swift, 6 Hare, 312.

(*m*) Bell *v.* Spereman, Sel. Ca. in Ch. 59.

(*n*) Rocke *v.* Cooke, 2 De G. & S. 493; 2 Ph. 691; Try *v.* Try, 13 Beav. 422; 15 Jur. 809; Onyon *v.* Washbourne, 14 Jur. 497.

(*o*) Anon. 6 Ves. 288; Angel *v.*

if he have already brought an action, or have otherwise interfered with the receiver's possession without leave of the court, the order which restrains these acts will also give him leave, or direct him to be examined *pro interesse suo*, the plaintiff in the cause being directed to exhibit interrogatories for that purpose (*p*).

The particular mode of proceeding is in the discretion of the court, which considers in what manner the right can best be tried, and which will also, if it be necessary, direct the trial of an issue (*q*). And where the facts are not disputed, but there is only a question of law, which may be fitly decided in court, and no further materials are necessary to enable the court to form its judgment on the question, the person who disputes the receiver's appointment will not be compelled to file a bill, or even to come in for examination *pro interesse suo* (*r*). Thus leave has been given (*s*) at the hearing of the claimant's petition, to sue out an *elegit* against a life estate in the receiver's possession. Where it was held that no receiver ought to have been appointed, leave was given (*t*) at the same time to the execution creditor to levy notwithstanding the appointment.

And it seems that in a difficult case, to give time for an appeal, the execution creditor will have leave to levy at the expiration of a certain period, the debtor undertaking in the meantime to keep sufficient property within the bailiwick to answer the demand; or it will be ordered, that the petitioners may levy, unless the amount of the demand be paid into the bank to the credit of the cause, within a week

Smith, 9 Ves. 336; Brooks *v.* Greathed, 1 Jac. & W. 178; Walker *v.* Bell, 2 Mad. 21; Pelham *v.* Duch. Newcastle, 3 Sw. 290, n.; Wharam *v.* Broughton, 1 Ves. 180; Hamlyn *v.* Lee, 1 Dick. 94; but this case is not accurate; 3 Hare, 469; Gomme *v.* West, Dick. 472; Reeves *v.* Cox, 13 Ir. Eq. R. 247. For the practice on orders for examination *pro interesse suo*, see Dan. Ch. Pr. 952, ed. 4.

(*p*) Jones *v.* Claughton, Jac. 573; Hamlyn *v.* Ley, Set., ed. 2, 629; ed. 3, 1220.

(*q*) Empringham *v.* Short, 3 Hare, 461. This and several of the other cases cited relate to sequestrations, which have been repeatedly declared to stand upon the same footing as those relating to receivers.

(*r*) Per Parker, C. J., 1 P. Wms. 308; Dixon *v.* Smith, 1 Sw. 457.

(*s*) Gooch *v.* Haworth, 3 Beav. 428.

(*t*) Russell *v.* East Anglian Railway Company, 3 Mac. & G. 125; 15 Jur. 939.

from the service of the order; the money to remain in the bank subject to the order of the court, and the receiver to be at liberty to pay it in (*u*).

Where the prior incumbrancer had been guilty of delay in pursuing his own remedies, the court refused his application, that the receiver, who had been appointed at the instance of the *puisné* mortgagee, should apply the rents according to the priorities; but leave was given to bring ejectment. The ground of this decision was, that the prior mortgagee had no right to that relief on petition which he had sought but had not followed up by another proceeding. But no costs were given against the prior incumbrancer (*x*).

792. The application for leave to proceed notwithstanding the receiver's possession, or to come in for examination *pro interesse suo*, may be made on summons by motion or on petition (*y*), and is usually framed in the alternative—that the receiver may pay the amount of the claimant's demand, or that the latter may be allowed to proceed.

Whether it was regular to except to the report of the master, upon an examination *pro interesse suo*, has been considered doubtful (*z*).

Of the Receiver's Expenditure.

793. It was laid down in the early cases that a receiver in this country could make no expenditure (*a*), or none to any considerable extent (*b*), without the leave of the court, or at least not at the discretion of the receiver (*c*); though greater power was always given to managers of West India estates, which otherwise would be ruined by the expense of remitting such part of the produce as could in the first instance be pro-

(*u*) Russell *v.* East Anglian Railway Company, 3 Mac. & G. 125.

(*x*) Brooks *v.* Greathed, 1 Jac. & W. 176.

(*y*) Angel *v.* Smith, 9 Ves. 336; Dixon *v.* Smith, 1 Sw. 458; Gooch *v.* Haworth, 3 Beav. 428; Potts *v.* Warwick and Birmingham Canal Navigation Company, Kay, 142; Russell *v.* East Anglian Railway Company, 3 Mac. & G. 125; Brooks *v.* Greathed, 1 J. & W. 176; Dan. Ch. Pr. 1580, ed. 4.

(*z*) Empringham *v.* Short, 3 Hare, 461.

(*a*) Fletcher *v.* Dodd, 1 Ves. jun. 85; Morris *v.* Elme, id. 139.

(*b*) A.-G. *v.* Vigor, 11 Ves. 563.

(*c*) Blunt *v.* Clitherow, 6 Ves. 799.

perly applied there (*e*) (**204**). The present course in England, both as to receivers and committees of lunatics, is to direct an inquiry into the circumstances of the expenditure, and whether it was for the benefit of the estate and of the parties interested therein; and if it be found to have been so, or it seems if the trustees of or persons entitled to the estate have directed the expenditure, the amount will be allowed to the receiver (*f*).

But the receiver will not, it seems (for so it was held in the case of the committee of a lunatic), be allowed the amount spent on an estate, in excess of and on a different scale from the expenditure which the court authorized him to make; even though it be certified that the actual expediture was more beneficial than that which was authorized (*g*). And the costs of the petition will not be given in such a case; though if it be shown that a sum, the expenditure of which the court had authorized, was saved by the new plan, such sum will be allowed to the receiver (*h*).

794. A special direction was not necessary to enable the receiver to propose ordinary repairs to the buildings on the estate, when it was the practice to insert in the decree a power to manage, set and let with the Master's approbation (*i*).

Of the Liabilities of the Receiver.

795. The receiver is not expected, any more than a trustee or executor, to take greater care of the property intrusted to him than he would of his own (*k*); and if he deposit money, which he has received on account of the estate, with a banker of good credit (*l*), in order to remit it more securely than by carrying the specie; or if he otherwise dispose of it with a view to its safety in a manner which would be reasonable if the money were his own, he shall not be liable for the failure

(*e*) Morris *v.* Elme, 1 Ves. jun. 139.

(*f*) Blunt *v.* Clitherow, 6 Ves. 799; A.-G. *v.* Vigor, 11 Ves. 563; Tempest *v.* Ord, 2 Mer. 55. As to committees, Ex parte Marton, Ex parte Hilbert, 11 Ves. 397.

(*g*) Re Langham, 2 Ph. 299.

(*h*) Re Langham, supra.

(*i*) Thornhill *v.* Thornhill, 14 Sim. 600.

(*k*) Per Lord Eldon, 1 J. & W. 247.

(*l*) Knight *v.* Lord Plymouth, 3 Atk. 480; 1 Dick. 120; and see Rowth *v.* Howell, 3 Ves. 565.

of the depositee. But the money ought to be deposited to the credit of the receiver in that character, or to be otherwise earmarked; for if he pay it to his private account with a banker, especially if the banker be one whom he generally employs, he shall be liable for the loss (*m*). The receiver is in a somewhat less favourable position in this respect than a trustee, because he receives a remuneration; and even a trustee or agent, who acts gratuitously, may be charged with the loss of money paid to his private account (*n*).

796. If the receiver put the fund out of his own control, so that others may deal with it, it has been said (*o*), that he guarantees the solvency of those persons, and becomes answerable for any loss that may ensue: which remark is of course not applicable to a temporary deposit, in the usual manner, with a banker, but was made with reference to a case, in which, for the safety of his sureties, the receiver had agreed that the monies should be deposited with bankers in the joint names of the sureties, and that all drafts should be written by one of the latter, and should be signed by the receiver; who was held (*p*) liable both in Chancery and in the House of Lords; on the ground, that he, being the person in whom the court confides, has no right to mix up his delegated authority with that of a stranger, nor, by substituting the discretion of the latter for his own, to do that which may prevent him from securing the fund, in a case of emergency. And though the object of the arrangement be to check the receiver, yet if the result be to introduce the control of an irresponsible person, who is unknown to the court, it seems that the receiver shall be answerable, not merely where that peril can be sworn to be the cause of the loss, but where he has not conducted himself as a prudent person would have done (*q*).

797. A person who, having assumed improperly the character, neglects the duties of a receiver, whilst the parties interested consider him to be acting as such, makes himself

(*m*) Wren *v.* Kirton, 11 Ves. 377.

(*n*) Massey *v.* Banner, 1 Jac. & W. 241; and see Challen *v.* Shippam, 4 Hare, 555.

(*o*) 2 R. & M. 218.

(*p*) Salway *v.* Salway, 4 Russ. 60; 2 R. & M. 215; and in House of Lords as White *v.* Baugh, 9 Bli. N. S. 181.

(*q*) Id.

responsible for any of the property which is lost through his neglect (*r*). And if rents be paid to a solicitor, in the assumed character of a receiver, he will be ordered to pay them over to the proper receiver, and can claim no lien upon them, either by virtue of any agreement with a party to the cause, or for his costs (*s*).

798. If the receiver have paid money to the wrong person, and is afterwards obliged to pay the amount into court, and after due application thereof a surplus remains, the court will not pay such surplus over to the person to whom the former payment was wrongfully made, without satisfying the receiver's demands; and it seems that the surplus fund would even be ordered to be repaid to him, if it had been got out of court by fraud or improper concealment (*t*). If, however, the wrongful payment were made by the receiver's agent, the receiver cannot have the benefit of such payment against the surplus fund, except subject to the liabilities of the agent to the person to whom the wrongful payment was made: and the accounts cannot be opened between those parties, on petition of the executor of the receiver, praying for repayment from the person wrongfully paid, or in default from the rents of the estate.

799. The receiver appointed by a colonial court is liable to be sued by the persons to whom the produce of the estate has been directed to be paid, for an account of such produce: and the consignees of the produce to whom express directions have been given for its application are liable to be sued, on the allegation that they are colluding with the receiver for the purpose of satisfying their claims against him, out of monies in their hands received from the estate, and due to the plaintiff; notwithstanding the existence of a remedy at law (*u*).

800. A bill has been held to be properly brought against a receiver, and the owner of the surplus of the rents, out of which the receiver had been directed to keep down the incumbrances, for satisfaction of a judgment debt out of such

(*r*) Wood *v.* Wood, 4 Russ. 558.
(*s*) Wickens *v.* Townshend, 1 Russ. & M. 361.
(*t*) Gurden *v.* Badcock, 6 Beav. 157.
(*u*) Fitzgerald *v.* Stewart, 2 Sim. 333.

surplus (*x*); the plaintiff's right to be examined *pro interesse suo* being held not to interfere with his right to sue: but the receiver is not a necessary party to a bill by a first incumbrancer to establish his rights, and it was said that, but for the case last cited, the bill would have been dismissed against him with costs (*y*).

801. It is neither necessary nor proper to seek to restrain a person by injunction from receiving money from a receiver of the court (*z*). The object should be effected by an order upon the receiver.

802. It has been said (*a*), that if a receiver be appointed by the court upon the application of a mortgagee or other incumbrancer, and the receiver embezzle or otherwise waste the rents, the loss shall fall upon the mortgagor. Lord Chancellor Manners, observing upon this as only a dictum of Lord Thurlow's, distinguished (*b*) the case of a trustee appointed by creditors, upon whom, and not upon the debtor who had executed a deed of assignment, he held that the loss arising from the bankruptcy of the trustee should fall.

803. Upon motion on behalf of a late ward of court, charging that the accounts formerly passed were such as should not bind the applicant, and stating errors and neglect, the receiver was ordered to account again from the beginning (*c*).

Of the Receiver's Allowances.

804. Receivers appointed by the court are directed to be allowed a proper salary for receiving the rents and profits, or, as the case may be, an allowance in respect of the personal estate collected by them (*d*). But although the terms of the order appear to imply a distinction in the nature of the remuneration, the usual practice is to allow a per-centage upon the sums collected or received; but there is no universal rule as to the amount of such allowance. It varies from 2 to

(*x*) Lewis *v.* Lord Zouche, 2 Sim. 388.

(*y*) Smith *v.* Earl of Effingham, 7 Beav. 357.

(*z*) 2 Beav. 507.

(*a*) Rigge *v.* Bowater, 3 Bro. C. C. 365.

(*b*) Hutchinson *v.* Lord Massarene, 2 Ba. & Be. 49.

(*c*) Wildridge *v.* M'Kane, 2 Mol. 545.

(*d*) XXIV. Cons. Ord. s. 1.

10 per cent., 5 per cent, being generally (*e*) allowed upon rents of freehold and leasehold estates, which allowance is increased to 12 per cent. or upwards, where, from the smallness of the sums to be collected, their payment at short intervals, or other circumstances, the difficulty of collecting them is increased; and may, on the other hand, be much lessened, where there are great facilities for collecting the rents. The same principle is applied to the getting in of other monies, the allowance for which appears to vary from $2\frac{1}{4}$ to $1\frac{1}{4}$ per cent.; though, under particular circumstances, it may be either more or less: and the payment for this duty is sometimes made by a round sum of money. The manager of mines or works is paid sometimes by a salary, and sometimes by a commission on the results.

The receiver's remuneration is settled from time to time when he passes his accounts; but even when paid by a percentage, he has no vested right to the receipt of monies, payable in respect of the estate, entitling him to insist that they shall pass through his hands, where poundage may be saved by a direct payment into court. The occasion of this resolution was an application (*f*) that the receiver might give further security to be answerable for large sums which had become payable; whereupon a cross petition was presented for payment of the money into court. Hence it seems proper to apply at once for payment into court, of all sums of money, the amount of which, if they were to pass through the hands of the receiver, would make further security by him necessary.

In lunacy it seems to be the practice (*g*) to order such monies into court, and not to give the receiver the benefit of the increased poundage, by allowing the funds to pass through his hands.

805. Where the receiver has lost his right to remuneration by omitting to pass his accounts within the proper period, the court will not acquiesce in the allowance of it, if minors be interested (*h*), though their guardians and all other parties

(*e*) Day *v.* Croft, 2 Beav. 488.

(*f*) Haigh *v.* Grattan, 1 Beav. 201.

(*g*) Ex parte Clayton, 1 Russ. 476; Ex parte Cranmer, id. 477, n.

(*h*) Dease *v.* Reilly, 4 Dru. & War. 284; see Ord. 23rd April, 1796; 15

consent: and though the delay was caused by the parties themselves in an endeavour to settle the dispute, and, in the meantime, to save the expense of passing the account.

If the receiver's default in bringing in his accounts on the appointed days were known to the parties, and the accounts have been passed, and poundage allowed without objection, no loss having been sustained by the receiver's fault, and no balance being due from him, the court will not afterwards listen to an application to strike out his allowance of poundage and costs at the instance of parties who have had the benefit of his services (*i*), but the amount of the allowance made to a receiver may be reconsidered (*j*), where, though an objection was originally made, the particular circumstances of the case and the nature of the items were not taken into consideration.

806. For a voluntary act done by the receiver beyond his ordinary duties, without the authority of the court or of all the parties interested, he will in general be entitled to no extra allowance (*k*); though, if he show that his exertions have been successful in creating a benefit to the estate, the court would consider it inequitable to allow the parties to take the benefit of his exertions without defraying the expenses attending them; upon which principle the receiver will also be allowed the costs incurred in the successful defence of an action, though he had defended it without the leave of the court (*l*) (**768**); but no costs will be allowed of a defence improperly made (*m*), or of a proceeding improperly taken and abandoned, though the receiver acted *bonâ fide* and succeeded in a subsequent proceeding (*n*). A receiver has been allowed the costs as between solicitor and client out of a fund in hand belonging to the incumbrancers, of a hostile application against

Ves. 278; and 148th Gen. Ord. of Court of Chancery in Ireland; but note that the Irish order is more stringent than that of the English court, requiring that no allowance be granted if the account be not duly passed, unless the master certify that the passing thereof ought to be postponed, with his reasons; and fix a time for passing it. For practice under the Irish order, see Purcell *v.* Woodley, 10 Ir. Eq. R. 422; Overend *v.* Overend, 6 Ir. Eq. R. 387.

(*i*) Ward *v.* Swift, 8 Hare, 139.

(*j*) Day *v.* Croft, 2 Beav. 488.

(*k*) Re Ormsby, 1 Ba. & Be. 189; Malcolm *v.* O'Callaghan, 3 M. & C. 52.

(*l*) Bristowe *v.* Needham, 2 Ph. 190.

(*m*) Swaby *v.* Dickson, 5 Sim. 631.

(*n*) Re Montgomery, 1 Mol. 419.

him, which was dismissed with costs, and was made by a defendant who was wholly unable to pay such costs (*o*).

It is no part of the ordinary duty of a receiver to incur the expense of journeying to and residing in a foreign country whilst prosecuting a suit which he was authorized to commence; and so far as his doing so was unauthorized, and not successful, especially if there were no question of fact or matter of evidence which could call for his presence abroad, he will be disallowed both expenses and remuneration (*p*); and the fact that the court has authorized a particular act, beyond the receiver's ordinary duty, gives no degree of sanction to the repetition of such an act, at his own discretion and without the authority of the court (*q*). Nor will the authority of some only of the persons interested assist the receiver's right against the estate; but the court will rather consider, that, in undertaking the duties in question, the receiver looked only to the personal undertaking of those parties (*r*).

807. The costs of drawing out a scheme of the estate, and of the holdings of the tenants, are chargeable, if at all, as part of the receiver's costs, and not of the solicitor's; but it seems that no allowance would be made to the receiver for such an item, where he is paid by a per-centage, though it may be necessary for the due performance of his duties (*s*).

808. Besides the usual fees payable in the judge's chambers, a further fee of 10*s.* on every 100*l.* received is payable (*t*) for every certificate on the passing of a receiver's and consignee's account; but where the receiver's duties, besides extending to the real and personal estate, comprised the management of the business; and the gross receipts for the year amounted to a very large sum, upon the whole of which it was considered that 10*s.* in the 100*l.* was payable; the lord Chancellor made a special order (*u*), that instead of that duty, such a fee should be paid as the judge to whose court the cause was attached should think reasonable. And in another case (*x*), the special

(*o*) Courand *v.* Hanmer, 9 Beav. 3.
(*p*) Malcolm *v.* O'Callaghan, 3 Myl. & C. 52.
(*q*) Id.
(*r*) Id.
(*s*) Re Catlin, 18 Beav. 511.
(*t*) Cons. Ord. Sched. 4.
(*u*) Wells *v.* Wales, 4 De G., M. & G. 816.
(*x*) Wastell *v.* Leslie, id. 818, note.

order was for payment of the fee of 10*s.* upon each 100*l.* of net profits.

Of passing the Receiver's Accounts.

809. Receivers' accounts are now passed in the judges' chambers, the accounting party, unless the judge shall otherwise direct, making out and verifying the account by affidavit. The items on each side are numbered consecutively, and the account is referred to by the affidavit as an exhibit, and is left in the judges' chambers. Any person who seeks to charge the receiver beyond the amount of which he has admitted the receipt, must give him notice of his intention, stating, as far as he can, the amount sought to be charged, and the particulars thereof, in a short and succinct manner (*y*). A summons is taken out to proceed upon the account, which, when passed, is to be entered by the receiver in books, but the affidavit verifying the account is to refer to it as an exhibit, and is not to be annexed to it (*z*). The rules concerning the time and manner in which the opinion of the judge may be taken upon any proceeding, as to which the chief clerk's certificate has not been signed and adopted by the judge, do not apply to certificates upon passing receivers' accounts, which may be approved and signed by the judge without delay, and upon being so signed, are to be filed and forthwith acted on (*a*). This provision follows the old practice, under which the Master's report of the receiver's account required no confirmation (*b*); and, therefore, did not admit of exceptions. Hence, the court would not enter into the consideration of any items of the account, but would upon the petition of the party complaining, examine any principle upon which the Master had proceeded, where error was imputed to him (*c*).

810. The Masters had power to call, without a special order, for whatever was necessary for the purpose of taking the re-

(*y*) XXXV. Cons. Ord. ss. 33, 34.

(*z*) 15 & 16 Vict. cc. 80, 86; XXIV. Cons. Ord. s. 3.

(*a*) XXXV. Cons. Ord. s. 54.

(*b*) 2 P. Wms. 729; Shewell *v.* Jones, 2 Sim. & S. 170.

(*c*) Shewell *v.* Jones, 2 Sim. & S. 170; 3 Russ. 522. In Ireland, objections are entertained to the amount of the items, though no erroneous principle be adopted. (Beytagh *v.* Concannon, 10 Ir. Eq. R. 351.)

ceiver's accounts; and an order against a receiver, who was plaintiff in the cause, for production of books at another place than the Masters' Office, was held to be wrong: as being an adverse order against him as plaintiff, and not as receiver; and it is contrary to the practice of the court to make such an order before decree. The order was, therefore, varied, and made an order for production as receiver before the Master (*d*).

811. Upon certificate of the receiver's default in bringing in his accounts, it will be ordered that he bring them in within a limited time (usually four days); and upon his neglecting to do so, the order may be enforced by process of contempt (*e*). This order may be had by one of several joint receivers against another who is in default. For though the receivers be only bound to account jointly, each of them must bring in his accounts of what he individually receives; and so long as one of them is in default the four day order is of course (*f*).

Of the Payment of Balances by the Receiver, his Representatives and Sureties, and of the Liability to Interest thereon.

812. The days upon which the receiver is annually (*g*) or at longer or shorter periods, at the discretion of the judge, to leave and pass his accounts at the chambers of the judge, to whose court the cause is attached, and upon which he is to pay the balance due upon such accounts, or such part thereof as shall be certified to be proper for the receiver to pay, are fixed by the judge and certified by the chief clerk; and upon leaving the account, a summons to proceed thereon is taken out; and such receivers as neglect to deliver their accounts, and to pay their balances, shall be disallowed their salaries, and charged with interest at 5 per cent. upon the balances, so long as they remain in their hands; and the court may discharge the receiver, and appoint another in his place. Every receiver, acting under the authority of the court, is in every year to direct his annual account of receipts and payments

(*d*) Maund v. Allies, 4 M. & C. 503.
(*e*) Dan. Ch. Pr. 1590, ed. 4.
(*f*) Scott *v.* Platel, 2 Ph. 229.
(*g*) XXIV. Cons. Ord. ss. 2, 3; XXXV. id. s. 23.

respecting the estate intrusted to his care to be examined and settled, within six months after the time appointed for delivery of the account, and his neglect to do so is directed to be certified.

813. Although the receiver is bound by his recognizance only to account yearly, he has no right to make interest for his own benefit, upon monies received in the intervals between the passing of his accounts. If any such sums be received, he ought to apply for an order to pay them into court, that they may be made productive for the benefit of the estate (*h*).

So if the receiver be directed to lay out the surplus rents and profits, when they shall amount to a competent sum, with the approbation of the court, or from time to time to pay the money into the bank, he ought not to wait until some person obtains an order for investment or payment, but may pay in the money on his own application (*i*); and he has been said in this case to be rather in the position of an executor, receiving capital sums, than of a receiver of rents and profits. And under, or by analogy to, the General Order of 23rd April, 1796 (*k*), (upon which, and the 63rd Order, April, 1828, the present Orders are founded,) the receiver who neglects to make the payments in pursuance of the order in that behalf, may be deprived of his salary and charged with interest; not, however, upon each sum as it came to his hands, but as an executor, and with regard to the circumstances under which he has kept the monies in his hands.

814. The defence, that the circumstances of the estate made it necessary to keep large sums in hand, will not prevent an inquiry as to what sums might or ought to have been reasonably laid out at interest; and upon such sums, when ascertained, interest will be charged at 4 per cent. (*l*). And in other cases, and even after the accounts have been passed, and all parties satisfied, inquiries have been directed, and interest has been enforced against receivers who have kept monies in

(*h*) Shaw *v.* Rhodes, 2 Russ. 539; Foster *v.* Foster, 2 Bro. C. C. 616; and see Earl Lonsdale *v.* Church, 3 Bro. C. C. 41.

(*i*) Hicks *v.* Hicks, 3 Atk. 274; Potts *v.* Leighton, 15 Ves. 273.

(*k*) See 15 Ves. 278.

(*l*) Hicks *v.* Hicks, 3 Atk. 274.

their hands (*m*). But after the accounts have been passed, and the balances paid in without any application for interest, or excuse suggested for the omission to apply, it seems (*n*) that if a case can be made at all for opening the accounts, with the view of charging the receiver with interest on balances retained in his hands, the costs of the proceedings would be thrown upon the applicants; and where a prior attempt by another party to charge interest on some of the same balances had failed, the subsequent application was altogether refused.

It seems to have been considered by the Masters, that they were not bound to be actors, in applying the General Order of 1796 (*o*); but it is not quite clear that this was always the rule (*p*), nor does such a construction appear to be consistent with the peremptory terms of the order.

815. It was laid down before the making of the Order of 1796, that a receiver should pay interest, if he kept money in his hands a quarter of a year after it ought to have been paid into court (*q*). Where a receiver had been very irregular in passing his accounts, which were so prepared, that neither the Master, nor the parties interested, could ascertain what was the real balance in the receiver's hands (payments having been made out of the balances between the days to which the respective accounts were made up, and those upon which they were carried in), inquiries were directed (*r*), as to the amounts of the balances in his hands upon several days in past years, and as to the sums due to the incumbrancers at those times, and the payments made to them. And the receiver was ordered to carry in his future accounts on or before a fixed day in every year, leaving at the same time an affidavit, setting forth the particulars of his receipts and payments between the day to which the account was made up, and that upon which it was carried in; and setting forth the true balance then in his hands.

816. A receiver who does not pay into court the balance

(*m*) Fletcher *v.* Dodd, 1 Ves. jun. 85; ——— *v.* Jolland, 8 Ves. 72; see Dawson *v.* Raynes, 2 Russ. 466.

(*n*) Ward *v.* Swift, 8 Hare, 139.

(*o*) Id.

(*p*) See Potts *v.* Leighton, 15 Ves. 274.

(*q*) Fletcher *v.* Dodd, 1 Ves. jun. 85.

(*r*) Bertie *v.* Lord Abingdon, 8 Beav. 53.

certified to be in his hands, pursuant to an order, may be committed upon affidavit of personal service, or his recognizance may be put in suit (*s*); but, in the former case, the order will be that the receiver do pay the balance within a week after personal service of the order, or stand committed.

The same remedies appear to be available against a receiver after he has been discharged, or after the cessation of his powers. If having been discharged, he have made default in payment of his balance, he will be ordered to pay it in with the amount of his salary and interest on both sums at 5 per cent. from the day first appointed for payment (*t*).

And, after dismissal of the bill, the receiver may be ordered on petition in the cause to pass his accounts and pay the balance due (*u*).

817. The admission by the executor of a receiver, of assets to answer what is due from his testator, in respect of rents received by him, is sufficient ground (*x*) to make the executor liable to pay such interest as the receiver's estate may be charged with in respect of the monies produced by the rents retained in his hands; and if the executor have petitioned to pass the accounts and pay the balance due, but have neglected the payment, he cannot be heard to say that he had no assets. But, in a case of *laches*, the executor will only be ordered to pay into court the principal money and costs of the application (*y*).

818. If the receiver die, a balance being due from him, the court has no jurisdiction to order his executor to bring in and pass the accounts, and to pay the balance out of the receiver's assets (*z*). It seems that a bill must be filed to compel such an account (*a*); but perhaps the order for payment might have been made, if the balance had been ascertained and the prayer for payment had not been joined to the prayer for an account (*b*). The parties interested in the fund may come to the court, either against the representatives or the surety of the receiver, and they must in the first place

(*s*) Davies *v.* Cracraft, 14 Ves. 143.

(*t*) Harrison *v.* Boydell, 6 Sim. 211.

(*u*) Pitt *v.* Bonner, 5 Sim. 577.

(*x*) Foster *v.* Foster, 2 Bro. C. C. 616.

(*y*) Gurden *v.* Badcock, 6 Beav. 157.

(*z*) Jenkins *v.* Briant, 7 Sim. 171. The case of Littleboy *v.* Spooner, Set. 1022, ed. 3, was by consent; see 15 Sim. 483.

(*a*) 15 Sim. 482; 3 Mac. & G. 176.

(*b*) 3 Mac. & G. 180.

apply against both, to avoid the objection which each might raise to the absence of the other. The court, therefore, without deciding which of these parties are primarily liable, will order on petition that the deceased receiver's recognizances may be enforced against his real and personal representatives and sureties, notwithstanding an alternative prayer that the personal representatives may pass the accounts (*c*).

It had been laid down, on the authority of the registrars, to be the practice not to put the recognizance in suit against the surety in default of payment by him of the amount due, without the amount being first ascertained, except where the receiver had absconded; and that a breach of the recognizance, by non-payment of the balance due by the receiver, must be shown as ground for liberty to put the recognizance in suit; but Lord Truro thought that the recognizance may also be enforced against the surety in the case of a deceased receiver, without ascertaining the amount due, where there were no means of ascertaining or enforcing the claim; treating the case of an absconding receiver as put by the registrars only as an example of an exceptional case in which it was difficult to ascertain the amount due (*d*).

819. The recognizances being given to the Master of the Rolls, and the senior (*e*) Vice-Chancellor for the time being, cannot be enforced without the leave of the court, and the enforcing them is in the discretion of the court (*f*). The surety, however, will be responsible for all acts of fraud or collusion on the part of the receiver, and (*g*) generally, to the extent of the recognizance, for whatever sum of money, whether principal, interest or costs (*h*), the receiver has become liable; including, where the recognizance is conditioned to be void if the receiver duly perform his duties, and account, the costs of his removal, and of the appointment of a new receiver in his place (*i*); it being the surety's duty to see

(*c*) Ludgater *v.* Channell, 3 Mac. & G. 175.

(*d*) Ludgater *v.* Channell, supra; and see 15 Sim. 482.

(*e*) Dan. Ch. Pr. 1593, ed. 4; XLII. Cons. Ord. s. 13.

(*f*) 3 Mac. & G. 178.

(*g*) See Dawson *v.* Raynes, 2 Russ. 466; 3 Jo. & Lat. 254.

(*h*) Re Lockey, 1 Ph. 509, the case of a committee.

(*i*) Maunsell *v.* Egan, 3 Jo: & Lat. 251; Keily *v.* Murphy, Sau. & Sc. 479.

that the accounts are duly passed; but under particular circumstances, as where (*k*) the receiver had been known to have been long bankrupt, and no steps were taken to pass his accounts, the surety may be excused payment of interest.

820. Where an action is brought against the surety, he may properly apply for an order for an account of what is due, and that he may pay the amount, not exceeding the amount of his recognizance, to the credit of the cause, and thereupon that the proceedings at law may be restrained; and he has been allowed to take such an order for payment by instalments, but the costs of the application and of the consequent proceedings fall on the surety, and cannot be deducted (*l*).

821. The surety is entitled to stand in the receiver's place for all monies due to the latter in account with the estate (**1461**); and if there be money in court which has been ordered to be paid to a receiver who has been discharged, the surety may file his bill; and upon motion, the receiver or those who claim under him may be restrained from taking the money out of court, without discharging the surety's claim. But where the surety filed his bill upon the same day on which the receiver assigned his estate to a trustee for his creditors, the plaintiff was put upon the terms of making the trustee a party to the suit (*m*).

Of the Discharge of the Receiver.

822. The receiver being appointed for the benefit of all the parties interested (**728**), the court will not generally discharge him on the mere application of the party at whose instance he was appointed (*n*). But if upon payment of the plaintiff's debt, the bill be dismissed, or proceedings in the suit be ordered to be stayed (*o*), it seems that as a general rule the receiver must be discharged; for with the plaintiff's rights fall the rights of the other parties. And this was held even against incumbrancers, whose rights were prior to those of the plain-

(*k*) Dawson *v.* Raynes, 2 Russ. 466.
(*l*) Walker *v.* Wild, 1 Mad. 528.
(*m*) Glossop *v.* Harrison, Coop. 61; 3 Ves. & B. 134.
(*n*) Bainbrigge *v.* Blair, 3 Beav. 421.
(*o*) Davis *v.* Duke of Marlborough, 2 Sw. 168; Paynter *v.* Carew, 18 Jur. 417.

tiff (*p*). But it has been held (*q*) in Ireland, that where there are prior creditors, parties to a suit, with whose claims the court by appointing a receiver has interfered, their rights will be protected by continuing the receiver, upon the terms that the persons so protected shall forthwith file a bill.

And in like cases in England, proceedings have been stayed (*r*), without prejudice to the order appointing the receiver.

A receiver appointed for the protection of property during the minority of several infants will not be discharged as to the share of one of them who has attained full age; the object of the appointment not having been fully effected (*s*).

823. Where an estate was vested in trustees, who were willing to perform the duties of the receiver without salary, they were substituted for him, for the purpose of applying the rents and profits as the receiver had been ordered to apply them; and upon their undertaking to account in the usual way: and they were not required to enter into recognizances (*t*).

824. The receiver cannot generally be discharged on his own application, where his appointment has been completed, without showing reasonable cause for the change (*u*); nor, unless it be shown to be for the benefit of the parties to the cause, or for other good reason, will the sureties be discharged (*x*): and the joining of the sureties in the application, either for the receiver's discharge or their own, will have no weight, unless it be shown to be for the benefit of the parties to the cause (*y*).

Infirmity, which prevents the receiver from properly discharging his duties, and ill health, increased by the anxieties of the office, afford a sufficient excuse for his discharge; and he will be allowed to deduct the costs of and incidental to the

(*p*) Davis *v.* Duke of Marlborough, supra.

(*q*) Murrough *v.* French, 2 Mol. 498.

(*r*) Damer *v.* Earl of Portarlington, 2 Ph. 30; Paynter *v.* Carew, 18 Jur. 417.

(*s*) Smyth *v.* Lyster, 4 Beav. 227.

(*t*) Bainbrigge *v.* Blair, 3 Beav. 421.

(*u*) Dan. Ch. Pr. 1600, ed. 4.

(*x*) Griffith *v.* Griffith, 2 Ves. 400; and see Hamilton *v.* Brewster, 2 Mol. 407.

(*y*) Griffith *v.* Griffith, supra.

application for discharge, out of the balance in his hands (*z*). It is also a good reason for discharging a surety on his own application, that he had become such in breach of his partnership articles (*a*).

825. It seems that a charge of misbehaviour against a receiver, for suffering the owner of the estate to remain in part possession to the prejudice of the estate, will not be admitted (*b*) as a reason for discharging the receiver; because the parties themselves have caused the loss by not compelling the owner, by the authority of the court, to deliver possession to the receiver.

But he is liable to be discharged for irregularity in carrying in his accounts, and for making it necessary to compel him to do so; and for so framing his accounts that the amount of the balance in his hands cannot be ascertained (*c*).

826. The appointment of a receiver in the place of sequestrators discharges the sequestration (*d*).

827. The application to discharge and to vacate the recognizances of the receiver may be (*e*) by petition or motion, or by summons in chambers; or the direction may be given in the decree or order on further consideration. Being a mere officer of the court, he ought not to appear upon the application for his discharge, although he was served with the petition; and he will not be allowed the costs of appearance (*f*). Upon the application to discharge a receiver, the defendant's answer is only regarded as an affidavit (*g*).

It has been laid down (*h*) that if the order direct the payment of the balance into court, the same order may direct the recognizance to be vacated on payment of the balance, which will be shown by the certificate of the Accountant-General. But if the payment be directed in any other manner than into court, the payment must be proved, and a second petition (which, however, need not be mentioned

(*z*) Richardson *v.* Ward, 6 Mad. 266.

(*a*) Swain *v.* Smith, Set., ed. 2, 548; ed. 3, 1021.

(*b*) Griffith *v.* Griffith, 2 Ves. 400.

(*c*) Bertie *v.* Lord Abingdon, 8 Beav. 53.

(*d*) Shaw *v.* Wright, 3 Ves. 24.

(*e*) Dan. Ch. Pr. 1601, ed. 4.

(*f*) Herman *v.* Dunbar, 23 Beav. 312.

(*g*) 15 & 16 Vict. c. 86, s. 59.

(*h*) Lawson *v.* Ricketts, 11 Beav. 627.

in court) must be presented for the order to vacate the recognizance. It is said (*i*), however, that the latter rule is not now followed, but that the recognizance will be (at once) vacated upon a proper affidavit of payment to the party entitled to receive the balance, as well as upon the Accountant-General's or Chief Clerk's certificate.

828. Where the recognizances were enforced against the surety to recover monies due from the receiver, the court would not at first discharge the recognizance on the application of the surety, who had paid the debt to the solicitor prosecuting the proceedings; such payment being thought to be insufficient, though it was admitted that the solicitor was authorized to receive the money, and though the plaintiff had been served with the petition and did not object: but the order was made (*k*) after the plaintiff had been served with notice that it would be made on a subsequent day unless cause were shown, but did not appear.

829. Notice of an application to discharge a receiver ought to be served personally upon him; and such service will not be dispensed with unless an order for substituted service be first obtained (*l*).

830. A receiver who has been discharged, and does not pay in his balance as directed, is subject to the order of 1796 (813), and will be ordered to pay in the balance, with the amount of his salary, and interest at 5 per cent. on both sums, from the day first appointed, as well as the costs of the motion (*m*).

831. When a receivership has been completed, the book containing the accounts is to be deposited in the Office of the Clerks of Records and Writs (*n*).

(*i*) Set. ed. 2, 549; ed. 3, 1023.
(*k*) Mann *v.* Stennett, 8 Beav. 189.
(*l*) A.-G. *v.* Haberdashers' Company, 2 Jur. 915.
(*m*) Harrison *v.* Boydell, 6 Sim. 211.
(*n*) XXIV. Cons. Ord. s. 34.

Chapter VI. Part 4.—Of Possession by the Creditor of the Security; and herein of the relative Rights of the Mortgagor, the Mortgagee, and their Tenants.

832. *Of the relative Rights of the Mortgagor and Mortgagee and of their Tenants, incident to the Possession of immoveable Property.*

858. *Of the Rights and Liabilities incident to the Creditor's Possession of personal Chattels.*

Of the relative Rights of the Mortgagor and Mortgagee and of their Tenants, incident to the Possession of immoveable Property.

832. After the execution of the mortgage, the mortgagor is usually allowed to retain possession of the estate, until, upon default in payment of interest the mortgagee finds it necessary to use the remedies given him by the security. A right to this possession is often specially secured to the mortgagor, and in the absence of such a provision, the legal mortgagee may enter immediately after the execution of the mortgage, by virtue of the estate thereby vested in him (*o*). After default, an express power of entry is also usually limited to him, and under these various circumstances, his position towards the mortgagor, or other persons in the actual possession of the mortgaged property, under tenancies commencing either before or after the date of the mortgage, sometimes becomes the subject of doubtful and difficult questions.

833. The rights of the mortgagee under these circumstances will be considered,

First, as they affect persons claiming under tenancies created before the date of the mortgage, and to which it is therefore subject.

Second, as they affect the mortgagor himself, when he remains in possession after the date of the mortgage, either without or with any express provision enabling him to do so in the mortgage deed.

(*o*) See Doe *d.* Roylance *v.* Lightfoot, 8 M. & W. 553. But a mere power to sell on default does not give a right to enter before sale. (Watson *v.* Waltham, 2 A. & E. 485.)

THIRD, as they affect persons claiming under tenancies, or other interests created by the mortgagor, after the date of the security, and either without or with the concurrence of the mortgagee.

And it is to be noted with respect to the second and third of these divisions of the subject, that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person, even though the latter may have a right to recover possession (*p*); and it makes no difference though the mortgagors be trustees, acting in a public capacity, and not for their own benefit (*q*). But a subsequent mortgagee, who has acquired the legal estate without notice of a prior equitable mortgage, may set it up notwithstanding it was acquired by the mortgagor under whom he claims, after the execution of the prior security (*r*).

834. *Firstly*, then, where the tenancy commences before the mortgage. By the conveyance the reversion passes to the mortgagee, and with it the right to receive the future rents, and the other rights incident to the estate which theretofore belonged to the mortgagor (*s*). The tenant may nevertheless safely pay the rent to the mortgagor, so long as he is allowed by the mortgagee to receive it; for though the conveyance is effectual, as to the grantee's rights against the tenant, without any attornment (*t*) by the latter, the tenant is not prejudiced

(*p*) Per Lord Mansfield, 1 T. R. 760, n.; 2 H. Cowp. 600.

(*q*) Doe *d.* Levy *v.* Horne, 12 L. J. (N. S.) Q. B. 72; notwithstanding dictum in Fairtitle *v.* Gilbert, 2 T. R. 171, explained id.

(*r*) Right *d.* Jefferys *v.* Bucknell, 2 B. & Ad. 278.

(*s*) Trent *v.* Hunt, 9 Exch. 14; per Lord Denman in Rogers *v.* Humphreys, 4 Ad. & E. 299. See Salmon *v.* Dean, 3 Mac. & G. 344; 15 Jur. 641.

(*t*) 4 Ann. c. 16, s. 9. Attornments made in consequence of some judgment at law, or decree or order of a court of equity, or to any mortgagee after mortgage forfeited, are excepted from the attornments by tenants to strangers, which are made void by 11 Geo. 2, c. 19. The tenant of a mortgagor, who does not give him notice of ejectment brought by the mortgagee to enforce attornment, is not liable to the penalties of sect. 12 of the same statute for secreting ejectments. (Buckley *v.* Buckley, 1 T. R. 647.) And a mortgagee is not allowed to come in and defend as a landlord in ejectment under the statute unless he is interested in the result of the suit. (Doe *d.* Pearson *v.* Roe, 6 Bing. 613.)

by payment of the rent to the grantor, or by breach of any condition for non-payment of rent before notice of the grant (*u*).

835. The mortgagor, under these circumstances, although, being no longer the owner of the reversion, he cannot sue the tenant in ejectment (*x*), may distrain for the rent, in the name and as the bailiff of the mortgagee, under an implied authority from him to enforce payment of the fund out of which his interest may be paid. And even though he distrain as for rent due to himself, he may justify as the bailiff of the mortgagee (*y*). The like authority is implied in favour of the owner of the equity of redemption, who has paid off the mortgage, on an undertaking for a transfer of the security (*z*).

836. When, on the other hand, the mortgagee gives notice to the tenant holding under a tenancy prior to the mortgage, he becomes entitled to, and may distrain or sue for, the rent in arrear since the mortgage, and also for that which subsequently accrues (*a*); and this whether the tenant holds under a lease, or from year to year; or he may sue a tenant claiming under an agreement for a lease made by the mortgagor for use and occupation (*b*); and even if, after the mortgage, the terms of the holding have been varied as to the amount of rent, by agreement between the tenant and the mortgagor: such an agreement being considered not to alter the relative positions of the mortgagee and the tenant, but to be adopted by the former as the act of an agent, and to entitle him to recover the additional as well as the original rent (*c*).

837. The mortgagor, after the mortgagee has taken possession, has no remedy in equity against the tenant in respect of rent alleged to be due from him, but for which the mortgagee has refused to apply (*d*). His only remedy is against the mortgagee on taking the accounts.

838. *Secondly.* The relation between the mortgagor himself and the mortgagee, where the former remains in possession of

(*u*) 4 Ann. c. 16, s. 10.

(*x*) Doe *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065.

(*y*) Trent *v.* Hunt, 9 Exch. 14.

(*z*) Snell *v.* Finch, 9 Jur. (N. S.), 333; 13 C. B. (N. S.) 651.

(*a*) Moss *v.* Gallimore, Dougl. 279.

(*b*) Rawson *v.* Eicke, 7 A. & E. 451.

(*c*) Burrowes *v.* Gradin, 1 Dowl. & L. 213.

(*d*) Salmon *v.* Dean, 14 Jur. 235.

the mortgaged estate, without any express provision that he should do so, has been the subject of much discussion, arising less from any real question as to the relative rights of the parties, than from the embarrassment caused by the technical effect of the words by which the relation has been attempted to be defined—an embarrassment which has led one learned judge to declare, that it was very dangerous to define the precise relation in which the mortgagor and mortgagee stand to each other in any other terms than those very words (*e*); and another, that it is sufficient to call them mortgagor and mortgagee, without having recourse to any other description of men, or to what they are most like; their rights, powers and interests being as well settled as any in the law (*f*). It will, therefore, be sufficient to say that the mortgagor in possession, under such circumstances, is not, as he was sometimes called, tenant at will to the mortgagee, seeing that he is not, like a tenant at will (*g*), entitled to the crops growing on the land at the end of the tenancy, and that he may be ejected without notice or demand of possession (*h*): nor yet the mortgagee's bailiff or receiver, because not obliged to account to him for the rents (*i*). By Lord Mansfield the mortgagor was said to be tenant at will quodam modo (*k*), and he has been said to be tenant *by*, as distinguished from tenant *at*, sufferance; but these definitions barely mark without explaining the distinctions which they imply. The likeness of the mortgagor's interest to that of a tenant at sufferance is so far correct, that it agrees with his position as one who comes in by right, and holds over without right (*l*); but, following the caution of Lord Mansfield, that nothing is more apt to confound than a simile, the mortgagor in possession may be described as one who, having parted with his estate, remains in possession at

(*e*) Per Lord Denman, 11 A. & E. 314.

(*f*) Per Buller, J., 1 T. R. 383.

(*g*) See Ex parte Temple, 1 G. & J. 216, where the mortgagor was held entitled to the crops as tenant at will by express contract.

(*h*) See per Buller, J., 1 T. R. 383; per Lord Tenterden, 8 B. & C. 767.

(*i*) 1 T. R. 383.

(*k*) Dougl. 282.

(*l*) Lord Ellenborough, 3 East, 440; Lord Tenterden, 8 B. & C. 767; 1 Smith's L. C., note to Keech *v.* Hall. See Doe *d.* Fisher *v.* Gibbs, 5 Bing. 421.

the pleasure and consistently with the right of the grantee, exercising the ordinary rights of property, holding courts where lord of a manor (*m*), receiving the rents for his own use, and recognized by the legislature as the person entitled to vote in respect of the mortgaged property, in elections for knights of the shire and other members to serve in parliament (*n*); yet liable at the option of the mortgagee to be treated either as a tenant or as a trespasser, and to be ejected without notice, demand of possession or claim to rents in arrear or accruing, or to the growing crops (*o*).

839. We have next to consider those cases in which the mortgagor remains in possession under the express provisions of the security, and the effect created by any special remedies thereby given to the mortgagee against the rents of the estate. Sometimes a mere power is given to the mortgagee to enter and receive the profits of the land, which is in truth no more than the mortgagee may do under the conveyance (*p*); but the mortgage also often contains a power of distress, and provisions, under which, either directly or constructively, the relation of landlord and tenant is created between the mortgagor and mortgagee. A simple instance of a constructive tenancy arises where there is a provision that the mortgage shall not be called in till the expiration of a given term, and that until default in payment it shall be lawful for the mortgagor and his heirs peaceably to enjoy and receive the rents (*q*); this amounts to a re-demise by the mortgagee to the mortgagor during the term fixed. The result is not the same

(*m*) 1 Scriven, 91, note.

(*n*) 8 Hen. 6, c. 7; 2 Will. 4, c. 45, s. 23; 6 & 7 Vict. c. 18, s. 74. The monthly payments secured by mortgage to trustees of a benefit building society under 6 & 7 Will. 4, c. 32, are a charge on the estate which will destroy the owner's right to vote, if they do not leave him the quantity of interest prescribed by statute. (Copland, app., Bartlett, resp., 6 C. B. 18.) The mortgagor in possession is also a person who hath or holdeth lands or tenements within the Statute of Sewers (23 Hen. 8, c. 5, s. 3), and may be fined for the non-repair of sea banks. (The Queen *v.* Baker, L. R., 2 Q. B. 621.)

(*o*) Doe *d.* Roby *v.* Maisey, 8 B. & C. 767; Trent *v.* Hunt, 9 Exch. 14; Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307; Doe *d.* Fisher *v.* Gibbs, 5 Bing. 421; Jolly *v.* Arbuthnot, 4 De G. & J. 224; 5 Jur., N. S. 80, 689.

(*p*) See Doe *d.* Roylance *v.* Lightfoot, 8 M. & W. 553.

(*q*) Wilkinson *v.* Hall, 3 Bing. N. C. 508.

where the covenant is, that the mortgagee may enter *after* default, which is held not to imply that the mortgagor may remain in possession *until* default, but only to leave the mortgagee up to that period to rest upon his title under the conveyance, and afterwards to give him also the benefit of the covenant (*r*). In considering these questions, the courts have been guided by the authority of Sheppard's Touchstone, in which it is laid down (*s*), that "if A. bargain and sell his land to B. on condition to re-enter if he pay him £100, and B. doth covenant with A. that he will not take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease:" for want, adds Mr. Preston, of a more formal contract, and also for want of certainty of time. "And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land, until the day of payment of the money, in this case, albeit the time be certain, yet this is no good lease but a covenant only;" since, says the learned editor, the words are negative only and not affirmative.

Therefore, though the words used imply some right of possession in the mortgagor, they will not amount to a re-demise to him, unless, as in *Wilkinson* v. *Hall* cited above, some certain time be fixed during which the mortgagor is to hold (*t*). So that no demise is created by a covenant that the mortgagee shall not sell or lease without a month's notice demanding payment and default thereon; and for want of this certainty, doubt has been cast upon a decision in which, on mortgage by husband and wife of her land to secure an annuity, upon trust to permit her to receive the rents, until default for

(*r*) Doe *d.* Roylance *v.* Lightfoot, 8 M. & W. 553; Rogers *v.* Grazebrook, 8 Q. B. 895. So the distinction has been taken, that under a proviso that the mortgagee shall not meddle with the possession of the premises or the receipt of rents till default of payment, the mortgagor is only tenant at sufferance, but tenant at will under a covenant that he should take the profits till default of payment. (Powseley *v.* Blackman, Cro. J. 659.)

(*s*) Vol. 2, 272.

(*t*) Doe *d.* Parsley *v.* Day, 2 Q. B. 147, explaining Wheeler *v.* Montefiore, 2 Q. B. 133, which was an action of trespass by a mortgagee by way of underlease against the sheriff, who entered under an execution against the mortgagor, and pleaded that plaintiff was not possessed. There was a proviso for redemption on a certain day, and that on nonpayment the plaintiff might enter, but no covenant that the mort-

sixty days in payment of the annuity, the estate was held to have been re-demised to the mortgagor until default (*u*).

840. Although a tenancy may be created by sufficient words in the deed, it will not be allowed where the effect would be inconsistent with the general object of the deed. Such an inconsistency was held to arise, where the object of the deed being to secure certain payments, the grantors were to retain possession and take the rents until default; and yet it was provided that he should hold as tenant at will to the mortgagee at a rent, subject to a power of re-entry in case of non-payment, and to all usual covenants and remedies in leases; and the latter provision was rejected, because it would have subjected the mortgagor to a distress for rent, before default in payment of the debt intended to be secured, and even before that debt became due (*x*).

841. Where the validity of the distress depends upon the existence of a tenancy, which tenancy the deed purported to create by an attornment, the tenancy will arise, and the distress take effect, by force of the intention of the parties, though it appear on the face of the deed that the person to

gagor might remain in possession till the day fixed. The verdict was for the plaintiff, which was afterwards held to be wrong; and it was said that his right to possession did not accrue till the day fixed for redemption, which implied a right in the mortgagor till that time; but the reason was also given, and is now taken to have been the ground of the decision, that a lessee before entry cannot maintain *trespass*.

(*u*) Doe *d.* Lyster *v.* Goldwin, 2 Q. B. 143. See also Gale *v.* Burnell, 7 Q. B. 850, where an assignment of chattels, with a proviso that in case of payment on a certain day, or on an earlier day as the mortgagee should appoint by ten days' notice in writing, with interest in the meantime, the assignment should be void; and that after default the mortgagee might take possession and sell, but that the mortgagor might hold till default: it was held that there was nothing to defeat the original grant, or to operate as a re-demise.

(*x*) See Walker *v.* Giles, 6 C. B. 662, as explained in cases cited below; Pinhorn *v.* Souster, 8 Exch. 763. And see remarks on Walker *v.* Giles in Turner *v.* Barnes, 2 B. & S. 435, where it was held, that, assuming the tenancy created to be a tenancy at will, and therefore to have ceased at the death of the mortgagor, the mortgagee was not justified in distraining afterwards upon his widow, who remained in occupation; it being necessary, under the statute 8 Ann. c. 14, s. 7, to distrain during the possession of the tenant from whom the arrears became due, and that the wrongful distress did not become good by relation when the widow afterwards became the administratrix of the mortgagor.

whom the mortgagor attorned, being a mere receiver, has no reversion to which the power of distress could be incident (*y*).

842. But notwithstanding the existence of apt words for the creation of a tenancy, the mortgagee may retain his ordinary power of ejectment, in that character, if his ordinary rights be reserved. Therefore, where, in one case (*z*), a yearly rent was reserved, not exactly corresponding with the interest, with power for the mortgagee to use such remedies as landlords have on common demises, the expressions used being properly applicable to cases of landlord and tenant; and in another (*a*), where the mortgagor, by the deed, attorned tenant to the mortgagee at a rent; a proviso in the first that the right to enter and evict the mortgagor after default should not be prejudiced by the reservation of rent, and in the latter a power of re-entry in case of default, were held to entitle the mortgagee to eject the mortgagor without notice to quit or demand of possession, though in one case the mortgagee by distraining had treated the mortgagor as his tenant (*b*).

843. A tenancy between the mortgagor and mortgagee is not created (*c*) by the mere grant of a power to the mortgagee

(*y*) Jolly *v.* Arbuthnot, 4 De G. & J. 224; 5 Jur., N. S. 80, 689.

(*z*) Doe *d.* Garrod *v.* Olley, 12 Ad. & El. 481.

(*a*) Doe *d.* Snell *v.* Tom, 4 Q. B. 615.

(*b*) In cases arising out of the same transaction which came before the Courts of Queen's Bench and Exchequer, and in which the mortgagee had a power of entry on default, the mortgagor attorned to the mortgagee as tenant from year to year at a rent, to the intent that he might have, for recovery of interest, the same powers of entry and distress as by law are given to landlords for recovery of rent in arrear; the mortgagor remained in possession for more than a year, and the mortgagee after default assigned. It was held in the Queen's Bench in trespass, that the mortgagee could not, after assignment, enter and distrain for arrears of interest due before assignment, the deed not creating a mere licence to seize, but a tenancy, under which there could be no distress after conveyance. But the Court of Exchequer held, that the tenancy from year to year, if any were created, was only for the purpose of giving a right to distrain, and that the whole matter was overridden by the mortgagees' right of entry. (See Brown *v.* Metropolitan Life Assurance Society, 28 L. J. (Q. B.), 236; and Metropolitan Life Assurance Society *v.* Brown, id. (Exch.) 340.) The result appears to be, that however convenient may be the powers of distress and tenancy clauses, they should always be accompanied by, and made subject to, a special right of entry on default.

(*c*) Doe *d.* Wilkinson *v.* Goodier, 10 Q. B. 957.

to distrain for interest in arrear (which may be given whether the mortgagor have or have not the legal estate, he being in possession (*d*)), even though he be empowered to distrain as for rent reserved by lease; the word "rent" in such a case not requiring the existence of a tenancy, but being used only to direct the mode of dealing with the distress. The grant may operate as a rent-charge where the estate is not conveyed by the security, or vested in the mortgagee, as in the case of a covenant to surrender copyholds; but upon the admittance of the mortgagee, the rent-charge will necessarily cease, and the grant will thenceforth operate only as a covenant, enabling the mortgagee to seize such goods as are on the premises when the distress is made, and to treat them as if distrained (*e*).

844. The nature of the tenancy will depend upon the language and intention of the deed; and the reservation of a yearly rent will not necessarily create a tenancy from year to year. A covenant for quiet enjoyment by the mortgagor, as tenant at will to the mortgagee, on payment of a yearly rent, will create only a tenancy at will at a yearly rent, though coupled with a proviso that no possession should be taken till the expiration of twelve months after notice of such intention to the mortgagor: no certain term being thereby created (*f*). And an agreement by the mortgagor to become tenant during the will and pleasure of the mortgagee, at a rent payable on certain days in every year, will also create a tenancy at will, with rent payable at the rate of so much a year (*g*).

Where the estate was devised by the mortgagee, to whom the mortgagor had attorned tenant at a rent, and the mortgagor remained in possession and paid rent, the subsequent occupation, connected with the provisions of the deed, were held (*h*) to constitute the relation of landlord and tenant, and to entitle the devisees to distrain, though receipts for the rent

(*d*) Chapman *v.* Beecham, 3 A. & E. 723. It seems that a mere personal licence to distrain cannot be transferred. (Brown *v.* Metropolitan Life Assurance Society, 28 L. J. (Q. B.) 236.)

(*e*) Freeman *v.* Edwards, 2 Exch. 732.

(*f*) Doe *d.* Dixie *v.* Davis, 16 Jur. 44.

(*g*) Doe *d.* Barstow *v.* Cox, 11 Jur. 991.

(*h*) West *v.* Fritche, 3 Exch. 216.

were given as interest, and the deed was executed by the mortgagor only.

845. As to property to which the mortgagee has no claim, as furniture in a mortgaged house, which has become vested in the mortgagor's assignees in bankruptcy, if the tenant after notice from the mortgagee pay him the whole rent, the tenant may be sued again for the use of that in which the mortgagee had no interest (*i*); for either the rent may be apportioned, or, upon the entry of the mortgagee, a new agreement may be inferred by the jury for the letting of the different kinds of property at several rents.

846. The mortgagor cannot determine the tenancy at will, by transferring his interest to another, without notice to the mortgagee, so as to affect his right to distrain (*k*).

847. The County Court Act, which enables (*l*) a landlord to recover possession by plaint in a county court of tenements of a value not exceeding £50 per annum, only contemplates (*m*) the ordinary case of landlord and tenant, and is therefore not applicable to that of mortgagor and mortgagee unless a tenancy have been actually created between them.

848. *Thirdly.* The mortgagor, being unable to confer upon another a greater right than he himself possesses, his tenant claiming under a demise of whatever kind, made after the mortgage, without the privity of the mortgagee, is, like his lessor, liable to be ejected without notice; and he has no remedy but against the mortgagor (*n*), whom a Court of Equity will not compel to pay off the mortgage for the purpose of perfecting the lease. The lessee in such a case was formerly left to his remedy at law, but now may have damages in equity, unless it appear that he came into equity for that purpose only, knowing that he had no case for specific performance (*o*).

(*i*) Salmon *v.* Matthews, 8 M. & W. 827.

(*k*) Pinhorn *v.* Souster, 8 Exch. 763.

(*l*) 9 & 10 Vict. c. 95, s. 122; Jones *v.* Owen, 13 Jur. 261. And see County Courts Act, 19 & 20 Vict. c. 108, ss. 50–56.

(*m*) Jones *v.* Owen, 13 Jur. 261.

(*n*) Keech *v.* Hall, Dougl. 21; Thunder *d.* Weaver *v.* Belcher, 3 East, 449. Per Lord Denman in Rogers *v.* Humphreys, 4 A. & E. 299.

(*o*) Costigan *v.* Hastler, 2 Sch. & Lef. 160; Howe *v.* Hunt, 31 Beav. 420.

Besides being liable to eviction by the mortgagee, or, if he pay rent to him, to have his own interest reduced at the utmost to that of a tenant from year to year, the tenant of the mortgagor after the mortgage, if called upon to pay rent to the mortgagor before he has paid it to the mortgagee, is liable to a distress by the former, whose title he is estopped from disputing. To escape from this double liability he is justified in giving up possession to the mortgagee upon his requiring payment of the rent, and threatening to enforce his rights upon refusal; and these acts of the mortgagee amount to a disturbance of the lessee in the enjoyment of the demised property, and an eviction, sufficient to support an action against the mortgagor upon his covenant for quiet enjoyment: the lessee's right to sue being unaffected by the circumstance that he has obtained from the mortgagee compensation for improvements (*p*).

849. But the mortgagee cannot bring trespass for mesne profits against a tenant who has come in after the mortgage, where (*q*) the mortgagee has not been in actual possession of the land. If he have obtained a verdict, or the defendant have suffered judgment by default in ejectment, the production of the record in the action will be evidence of the plaintiff's possession at the time of the demise; and he may recover the mesne profits subsequent to that date: but as to the profits prior to the demise, he must prove such a title, accompanied by possession, as would enable him to maintain an ordinary action of trespass.

Nor can the mortgagee distrain, or bring an action for rent under such circumstances, so long as the relation of landlord and tenant does not exist between him and the person in possession. If he recognize him as his own tenant he cannot afterwards treat him as a trespasser (*r*); and the effect of the recognition is not to set up a lease for years made by the mortgagor, but to create a new tenancy from year to year between the mortgagee and the lessee (*s*).

(*p*) Carpenter *v.* Parker, 3 C. B., N. S. 206.

(*q*) Turner *v.* Cameron's Coalbrook Steam Coal Company, 5 Exch. 932; Litchfield *v.* Ready, id. 939.

(*r*) Birch *v.* Wright, 1 T. R. 378.

(*s*) Doe *d.* Hughes *v.* Bucknell, 8 Car. & P. 566; Partington *v.* Woodcock, 5 Nev. & M. 672.

850. The courts have not always been agreed as to the nature of the acts which amount to a recognition by the mortgagee of the mortgagor's tenant, so as to enable the mortgagee to distrain for subsequent rent. It was formerly thought that by a mere notice to the tenant, that the future rents were to be paid to the mortgagee, a new tenancy arose between him and the occupier upon the terms of the original demise, and evidence of the notice was held to be sufficient answer to an action by the mortgagor for rent falling due subsequently (*t*). It was afterwards established, that neither a mere notice to the lessee, requiring him to pay rent to the mortgagee, without an attornment or other evidence of consent by the lessee, nor an authority from the mortgagor to the tenant to pay rent to the mortgagee, though communicated to and acted upon by the tenant, will make him the tenant of the mortgagee, or entitle the latter to distrain for the subsequent rent (*u*). Nor is the change of tenancy established only by proof of payment of interest, as such, by the person in possession of the land (*x*). But it has been held to be effected if the mortgagee, or his agent, call on the mortgagor's tenant to pay, and he actually pays the interest of the mortgage, instead of rent to the mortgagor (*y*). And the recognition of the tenancy is a matter of evidence, and may be inferred from other acts, as, for instance, if the mortgagee encourage the tenant to lay out money on the property (*z*). But where the mortgagor leased to a person who laid out money on improvements, it was held that the occasional inspection by the mortgagee of the improvements was not sufficient evidence of his acceptance of the lessee as his tenant (*a*).

Where the lease was neither prior nor subsequent to, but

(*t*) Waddilove *v.* Barnett, 5 Bing. N. C. 538; Pope *v.* Biggs, 9 B. & C. 245; Brown *v.* Storey, 1 Man. & G. 117.

(*u*) Evans *v.* Elliott, 9 A. & E. 342; Wheeler *v.* Branscombe, 5 Q. B. 373; Hickman *v.* Machin, 5 Jur., N. S. 576; 4 H. & N. 716. And see Doe *d.* Downe *v.* Thompson, 9 Q. B. 1037.

(*x*) Doe *d.* Rogers *v.* Cadwallader, 2 B. & Ad. 473.

(*y*) Per Lord Denman, Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307; Doe *d.* Whitaker *v.* Hales, 7 Bing. 322.

(*z*) See per Lord Denman in Evans *v.* Elliott, supra; Lord Mansfield in Keech *v.* Hall, supra.

(*a*) Doe *d.* Parry *v.* Hughes, 11 Jur. 698.

contemporaneous with the mortgage, because made under a power created by the same instrument, it was held that the notice of the mortgagee to the tenant in possession, entitled him to rents due at the time of the notice, and gave a right to distrain for them (*b*).

851. Although the subsequent lease be thus void as against the mortgagee, yet, as the tenant cannot dispute his landlord's title, the lease will be good against him until the mortgagee interferes (*c*); until which time the mortgagor may receive the rent for his own use, and may even distrain for it when unpaid.

And the tenant's interest by estoppel may be converted into a lease in interest by the conveyance of the mortgagee; so that a purchaser from the mortgagor will under such circumstances have a remedy against the lessee after the mortgage, on his covenants (*d*).

The mortgagor's interest by estoppel also passes by descent to his heir, and by purchase to an assignee, who may sue the tenant upon the covenants in the lease; and this although the estates of the mortgagor and mortgagee were both equitable, if the terms of the conveyance be sufficient to pass an estate in fee, to which the reversion by estoppel as against the lessee is considered to be equivalent (*e*). But there is no estoppel where the lease discloses that the land is mortgaged, and that the lessor has only an equity of redemption (*f*). The lessee's covenants are then only in gross, and cannot be sued upon by the assignee of the lessor. And where the assignee of the mortgagor also acquires the legal estate from the mortgagee,

(*b*) Rogers *v.* Humphreys, 4 A. & E. 299.

(*c*) Trent *v.* Hunt, 9 Exch. 14.

(*d*) Webb *v.* Austin, 7 M. & G. 701.

(*e*) Cuthbertson *v.* Irving, 5 Jur., N. S. 740; 6 id. 1211; 4 H. & N. 742; 6 id. 135. But in the case of an unadmitted mortgagee of copyholds, the tenant may not dispute the mortgagee's title, on the ground that estoppel will not operate upon an equitable estate. (Rayson *v.* Adcock, 9 Jur., N. S. 800; Doe *d.* North *v.* Webber, 3 Bing. N. C. 922.)

(*f*) Pargeter *v.* Harris, 7 Q. B. 708; Cuthbertson *v.* Irving, supra. In Saunders *v.* Merryweather, 3 H. & C. 902, it was held, that the assignee of the lease might show that the mortgagor was not the legal owner of the reversion; for though the mortgage did not appear on the face of the assignment of the lease, the latter recited an assignment of the mortgage, which recited the mortgage itself.

who was not privy to or estopped by the lease, the assignee will not be bound by it, though he have received rent from the tenant (*g*).

852. After the mortgagee has obtained payment of the rent, the tenant, in defending himself against a subsequent action by the mortgagor, is still not allowed to deny the mortgagor's title; he must admit it, and then show that it has been determined, and that he has been compelled to make the payment to the mortgagee (*h*); or if the payment were by the mortgagor's consent, the plea may be *riens en arrière* (*i*). A plea of payment to the mortgagee upon his demand, and threat to put the law in force in case of refusal, is in substance a plea of payment, being a recognition of the mortgagor's right and an admission that the rent alleged to have been satisfied was due to him (*k*). But a plea, that before the demise the owner mortgaged, and that the mortgagee gave notice, the tenant attorned, and the mortgagee distrained, amounts to a denial of the right to demise (*l*); and a plea of notice and claim by the mortgagee, without an averment of consequent payment of the rent to him, is insufficient (*m*).

853. The doctrine of estoppel against the tenant does not apply in such a case as an action by a mortgagor against a tenant for breach of agreement in not delivering up fixtures at the end of the term, when the mortgagee, after that time and before action by the mortgagor, has given notice and required payment of the rent; and the mortgagor can only recover damages for the detention of the fixtures between the end of the term and the date of the mortgagee's notice (*n*).

(*g*) Doe *d.* Downe *v.* Thompson, 9 Q. B. 1037.

(*h*) Alchorne *v.* Gomme, 2 Bing. 54; per Lord Denman in Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 307. And see Doe *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065.

(*i*) Dyer *v.* Bowley, 2 Bing. 94; 9 Moore, 196, per Park, J.

(*k*) Johnson *v.* Jones, 9 A. & E. 809.

(*l*) Alchorne *v.* Gomme, supra.

(*m*) Wilton *v.* Dunn, 15 Jur. 1104.

(*n*) Watson *v.* Lane, 11 Exch. 769, and per Pollock, C. B., the tenant was only estopped to the extent of the interest granted by the lease, and not after the termination of the lease; and the doctrine of estoppel is peculiar to the action of ejectment. But in Delaney *v.* Fox, 2 C. B., N. S. 768, this was denied, and the tenant was said to be estopped, whether the landlord was as-

854. A mortgagor to whom power is reserved to grant leases until entry by the mortgagee may lease to a trustee for himself; being within the exception as to dealings between persons filling fiduciary positions, which allows a tenant for life with power to sell or lease to execute the power to his own trustee (*o*).

855. The mortgagee is equally unable to grant a valid lease for years of the mortgaged estate without the concurrence of the mortgagor (*p*). If he agree to make a lease with the consent of the mortgagor, who afterwards refuses to concur, the lessee will not be allowed to insist upon a lease from the mortgagee alone; because the lessee himself may be deprived of it on redemption by the mortgagor, to whom also the mortgagee may be made liable for wilful default if the lease be shown to have been improvident; and where the state of the title was known to the lessee, it seems he would have no right to damages (*q*). Whether he can insist upon a lease from the mortgagee alone, when he was not privy to an intention that the mortgagor should concur, has been doubted; but it is submitted that in such a case there should be no specific performance of a contract which the mortgagor may render nugatory, and that the relief should be in damages only.

856. Where a lease by the mortgagee is confirmed by the mortgagor, and a power of re-entry is reserved to them, or either of them, to re-possess as of his and their former estate; as the mortgagor and mortgagee cannot have a joint interest, the right enures to the benefit of the person having the legal interest for the time, that is, to the mortgagee while his interest lasts, and to the mortgagor when his commences; but they cannot sue on a joint demise (*r*). So if rent be expressly made payable to the mortgagee during the continuance of the mortgage, and afterwards to the mortgagor, the covenant is

serting his title by ejectment at the end of the term, or defending an action of trespass at a future period.

(*o*) Bevan *v.* Habgood, 1 Jo. & H. 222.

(*p*) Hungerford *v.* Clay, 9 Mod. 1. Unless, it was said, in case of necessity to avoid apparent loss.

(*q*) Franklinski *v.* Ball, 33 Beav. 560; 10 Jur., N. S. 606.

(*r*) Doe *d.* Barney *v.* Adams, 2 Cr. & J. 232.

several, and an action will be well brought by persons claiming under the mortgagee, without joining the mortgagor(*s*). And as a joint lease by mortgagee and mortgagor operates as a lease by the mortgagee, with an equitable confirmation by the mortgagor, who is in law a stranger to the estate, a covenant by him as incident to the demise cannot be implied, and he cannot be sued jointly with the mortgagee (*t*).

857. If the covenants in the joint lease are only with the mortgagor and his assigns, an assignee of the mortgagee cannot sue for breach of the covenants, because they are collateral to, and do not run with his interest in the land (*u*); but the mortgagor for the same reason, though the reversion be extinguished, may sue the lessee on the covenants (*x*).

Where in the joint lease the covenants are with the mortgagee, who has the legal reversion, jointly with the mortgagor, who has none, the covenants run with the land, and may be sued upon by the joint covenantees (*y*).

Of the Rights and Liabilities incident to the Creditor's Possession of Personal Chattels.

858. The mortgagee of personal chattels may bring trover or trespass in respect of them, if, when the cause of action accrued, he had a right to immediate possession. This right is complete, if there be an assignment to the mortgagee not qualified by any clause which gives the mortgagor a right to continue in possession until default in payment on demand; nor limited as to the right of possession till some other future time, which, not having arrived till the goods are taken by a third person, the mortgagee is then unable to require possession of them (*z*). If he have that legal right, though it be coupled with a trust to permit the mortgagor to hold till demand of the debt, it will be sufficient to support the action;

(*s*) Harrold *v.* Whitaker, 11 Q. B. 147.

(*t*) Smith *v.* Pocklington, 1 Cr. & J. 445.

(*u*) Webb *v.* Russell, 3 T. R. 393.

(*x*) Stokes *v.* Russell, id. 678. See Thwaites *v.* M'Donough, 2 Ir. Eq. R. 97.

(*y*) Wakefield *v.* Brown, 9 Q. B. 209; Magnay *v.* Edwards, 17 Jur. 839.

(*z*) Bradley *v.* Copley, 1 C. B. 685; Wheeler *v.* Montefiore, 2 Q. B. 133.

the trust being consistent with a right of possession in the mortgagee (*a*).

But if the mortgagor, being in possession after the mortgage, disable himself by a voluntary and wrongful act from delivering the chattel to the mortgagee, the latter may bring trover against the purchaser, who can acquire no title by the wrongful act of the mortgagor (*b*).

859. The mortgagee may also recover in trover against a bailee, to whom the chattel was delivered by the mortgagor, before the mortgage; and therefore (*c*), after demand by the mortgagee, the bailee is justified in refusing to re-deliver the chattel to the mortgagor, notwithstanding his contract to do so, made before his situation was changed by the mortgage.

860. If a mortgage of chattels be subject to a proviso for redemption, on payment at a certain day, or at such earlier day as the mortgagee shall appoint by notice, the notice given must be sufficient to allow the mortgagor a reasonable time to obtain the money, and not illusory, as a half-hour's notice (*d*); that being only equivalent to payment on demand, for which the parties, if they had desired to do so, might have expressly provided: and even a covenant to pay immediately on demand will be so construed as to allow the debtor a reasonable opportunity to comply with the demand (*e*). If, however, he bring his action for a wrongful taking of the goods, for want of reasonable opportunity allowed for payment on demand, the damages will only be for the value of his interest in the goods at the time of seizure, and not for their actual value, for the creditor would otherwise be deprived of the benefit of the security.

861. The pledgee of a negotiable security may recover and receive the money due thereon, suing for it in his own name; but generally he has no right to compromise the claim for less than is due upon the security; and if he do so, he will be bound to account to the pledgor for the full value (*f*).

(*a*) White *v.* Morris, 16 Jur. 500; 11 C. B. 1015.

(*b*) Cooper *v.* Willomatt, 1 C. B. 672.

(*c*) European, &c. Company *v.* Royal Mail, &c. Company, 8 Jur., N. S. 136.

(*d*) Brighty *v.* Norton, 3 B. & S. 305; 32 L. J. (N. S.) Q. B. 38.

(*e*) Toms *v.* Wilson, 32 L. J. (N. S.) Q. B. 382.

(*f*) Story, Bailm. § 321.

862. The general rights and liabilities which are incidental to the mortgagee's possession of the mortgaged estate are for the most part brought in question in taking the accounts between the parties, and will therefore be fully explained in the chapter relating to that subject (**1581**). But the possession of chattels, whether by way of mortgage, pledge, or lien, involves considerations peculiar to the nature of those forms of security, and which may be conveniently referred to in this place.

863. The pawnee of chattels is bound to restore the pledge upon payment of the debt (*g*); he must use ordinary diligence and is liable for ordinary neglect in the care of it; and the default for which he is responsible extends as well to acts of omission as of commission (*h*). If the money for which the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because by detaining them after the tender of the money he is a wrongdoer and a wrongful detainer of the goods, and the special property of the pawnee is determined (**98**): and a man who keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss (*i*). Hence Story confines the liability to cases in which the same loss or accident would not otherwise inevitably have happened (*k*).

864. As to the pawnee's liability in cases of theft, it is laid down (*l*) that theft per se establishes neither responsibility nor irresponsibility in the bailee; if the theft be occasioned by negligence, the bailee is responsible; if without negligence, he is discharged. Ordinary diligence is not disproved even presumptively by mere theft, but the proper conclusion must be drawn from weighing all the circumstances of the particular case.

865. The liability of the holder of a chattel by way of lien,

(*g*) Story, Bailments, § 332; Jones, Bailments, 75; Glanvill, bk. 10, c. 8.

(*h*) Story, Bailments, § 342.

(*i*) Per Holt, C. J., in Coggs *v.* Bernard; Lord Raym. 909.

(*k*) Bailments, § 341.

(*l*) Story, Bailments, § 338; Kent, 2 Comm. pp. 580, 581. And he adds, I think it would be going quite far enough to hold, that such a loss is *primâ facie* evidence of neglect, and that it lies with the pawnee to destroy the presumption.

to preserve it, appears to be the same as in the case of a pawn. Some difficulty was felt in the allowance of a lien where the detention of it would cause expense to the claimant—the chattel being a mare, detained to answer the charge for covering—because of the question who should be liable for the feeding; but the difficulty was solved by reference to the analogous case of a distress kept in pound covert, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate; and to the case of a lien on corn, which requires labour and expense in the proper custody of it (*m*).

866. The holder of a chattel under a lien (*n*), or, it is conceived, by way of pledge, cannot require payment for the use of the place in which the chattel is detained, or otherwise for keeping it. Nor can a right to such a payment be acquired under a lien by a notice that it will be demanded; and if the payment be made under protest to regain possession of the chattel, the money may be recovered by action.

867. The pawnee of a chattel taking a special property in it by the act of the pledgor, acquires with the possession a certain right of user, which does not belong to one whose possession (as in the case of a distress) arises by act in law (*o*). The pawnee's right of user depends upon the nature of the chattel, and the extent to which the use of it may be beneficial, injurious, or indifferent to its due preservation (**1582**). The result of the authorities upon this subject is thus stated by Mr. Justice Story (*p*):—

1. If the pawn be of such a nature that the due preservation of it requires some use, the use is not only justifiable but is indispensable to the faithful discharge of the duty of the pawnee.

(*m*) Scarfe *v.* Morgan, 4 M. & W. 284.

(*n*) Somes *v.* British Empire Shipping Company, 8 H. L. C. 338; 1 El. Bl. & El. 353. See Thames Ironwork Company *v.* Patent Derrick Company, 1 K. & J. 93. But Lord Ellenborough seems to have thought that an analogous right could be maintained after a reasonable time and notice to remove the chattel. (Hartley *v.* Hitchcock, 1 Stark. 408.)

(*o*) Mores *v.* Conham, Owen, 123.

(*p*) Story, Bailments, §§ 329, 330.

2. If the pawn will be the worse for the use, as in the case of the wearing of clothes, the use will be prohibited (*q*).

3. If the keeping of it be a charge to the pawnee, as in the case of a cow or horse, it may be used by way of recompence: the cow may be milked, and the horse ridden (*r*).

4. If the use will be beneficial to the pawn, or indifferent, it may also be used. The instances of this suggested by Sir W. Jones are in the one case a setting dog, and in the other books (*s*).

5. If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, the use of it is impliedly interdicted.

Upon this latter point the law was somewhat differently stated by Holt, C. J. (*t*), who is followed by Sir W. Jones. Using as an illustration the pawn of jewels to a lady, he says that *she might use them;* but then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broken open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is because the pawn is in the nature of a deposit, *and as such is not liable to be used.* The passage seems to be contradictory, and is too doubtful an authority for the conclusion that goods not liable to injury by mere use may be used by the pledgee at his peril. The distinction, however, between a

(*q*) See also Mores *v.* Conham, Owen, 123, per Daniel.

(*r*) Id.; per Cook, Warburton and Daniel.

(*s*) Jones, Bailments, 81.

(*t*) Coggs *v.* Bernard, Lord Raymond, 909; Jones, 81. Under the Mohammedan law, there is, according to the *Hedàya*, a right to the possession only, and not to the usufruct of the pawn; and if the pawnee sell, let out or pledge the pawn, he commits a transgression for which he must make reparation (the pledge beyond the amount of the debt being a trust), but no dissolution of the contract takes place. The distinction between the use and preservation of the pawn is curiously illustrated by the example of a ring, for the loss of which the pawnee is responsible if he wear it on his little finger, which is a use; but not if he wear it on any other finger, which is considered to be a means of preservation, because it is contrary to the customary mode of wearing a ring. So of a sheet, which he may spread over his shoulders, but may not wear in the usual manner. (Pawns, Ch. 1.)

liability arising from the use of a pledge which ought not to be used, and from its use where it can be lawfully used, only at the peril of the pledgee, is probably of little practical importance.

868. The right of the mortgagee to made use of a ship is not precisely like that of the pawnee of an ordinary chattel, who, under the second of the above mentioned rules, would evidently be prevented from using it; though the keeping it unused for any length of time would hardly be less injurious than its employment.

The question is affected both by the higher nature of the interest of a mortgagee, and by the provision of the Shipping Act (*u*), that the mortgagee shall not by reason of his mortgage acquire, nor the mortgagor lose, the character of owner, except so far as may be necessary for making the ship or share available for payment of the mortgage debt. A right of user may of course be created by express agreement, or may be inferred from the terms of the security; and where according to this the ship, though in the possession of the mortgagees, was not to be sold till two months after demand in writing of the debt, it was considered (*x*), that a right to use the ship during that interval was implied, and not an intention that she should remain useless; and it was considered that such a right was contemplated by the provision of the Shipping Act above mentioned, as a means by which the ship might be made available for the payment of the mortgage debt; and was also incident to the character of a mortgagee as distinguished from that of a mere bailee. The judges of the Court of Appeal, however, taking a lower view of the mortgagee's rights, appear in effect to have agreed, that, though the first duty of the mortgagee of a ship who takes possession is to sell, he is not bound to do so at every sacrifice; and if he cannot reasonably or prudently do so, he will be justified, in the exercise of the sound discretion of a prudent owner, in employing the ship (*y*). But the unlimited right to send her

(*u*) 17 & 18 Vict. c. 104, s. 70.

(*x*) European, &c. Company *v.* Royal Mail, &c. Company, 4 K. & J. 676.

(*y*) Marriott *v.* Anchor Reversionary Company, 3 De G., F. & J. 177; De Mattos *v.* Gibson, 1 J. & H. 85, per Wood, V.-C.

to any distance, and to employ her for any indefinite time at the mortgagor's cost for repairs, wages, insurance and other disbursements and risks, and at the risk of involving him in speculative adventures, was strongly denied (*z*).

869. Where mortgagees in possession employed the ship in a trade which they had notice was unremunerative, and in so doing injured her, and afterwards made an improvident sale, they were charged with her value at the time of taking possession; although in the opinion of Turner, L. J., they should properly have been charged with what she might have earned if chartered in the ordinary course, according to the usual mode of charging mortgagees in possession, and with all damages beyond ordinary wear and tear occasioned by the use made of her (*a*).

A mortgagee may properly refuse to enter into a charter-party for the employment of the ship in a voyage of a speculative character (*b*).

870. The mortgagor, on the other hand, while the mortgagee allows him to retain possession, has full liberty to deal with the ship, so far as he can do so consistently with the sufficiency of the security. He may enter into such contracts for her use, as are proper to give the mortgagor the full benefit of the ownership, and by means of which he may earn the means of discharging the mortgage debt (*c*): and the mortgagee cannot maintain in the Admiralty an action of restraint against, and will be restrained in equity from interfering with, such a contract. And as well for this purpose, as that she may be a source of profit to the mortgagee himself when he takes possession, the mortgagor may do all that is proper to keep the ship in an effective condition; and for such repairs as are made by his direction when in possession, the shipwright may enforce his possessory lien against the mortgagee (*d*) (**252**).

(*z*) Marriott *v.* Anchor Reversionary Company, supra.

(*a*) Id. As to damages for loss of profit where a mortgagee is restrained from using the ship, see De Mattos *v.* Gibson, 1 J. & H. 79.

(*b*) Samuel *v.* Jones, 7 L. T., N. S. 760.

(*c*) Collins *v.* Lamport, 11 Jur., N. S. 1; The Innisfallen, L. R., 1 Adm. 72.

(*d*) Williams *v.* Alsop, 8 Jur., N. S. 57. See The Skipwith, 10 Jur., N. S. 445.

871. If, however, the mortgagee can show that the acts of the mortgagor will injure his security, the statutory provision that the mortgagor shall retain the character of owner (which in fact is said (*e*) to have been for the benefit of the mortgagee), will cease to operate (*f*). And the mortgagee may require payment to himself, of the fruit of any contract for the use of the ship which has been made by the mortgagor; for the right to receive the earnings of the ship, whether freight or passage money, passes to the mortgagee by the transfer, as incident to the ship (*g*) (**95**).

872. But the mortgagee must take possession before the mortgagor has received the produce, or has done an act tantamount to taking possession; otherwise, like the produce of a mortgaged estate, it cannot be recovered from the mortgagor (**1567**). And, even in the hands of the mortgagee, it is liable for the expenses of the voyage in which it was earned (*h*). But the mortgagee is not liable for necessaries supplied to the ship, unless the master in ordering them acted as his agent (*i*).

873. The pledge of a policy of insurance upon a ship passes no interest in the ship, and therefore does not entitle the pledgee to give notice to the underwriters of abandonment (*k*).

Chapter VI. Part 5.—Of Execution under Judgments.

874. The statute of Victoria (**135**), as to the operation of judgments against real estates, enacts (*l*), that the sheriff or

(*e*) Per Best, C. J., Dean *v.* M'Ghie, 4 Bing. 45.

(*f*) Collins *v.* Lamport, supra.

(*g*) Morrison *v.* Parsons, 2 Taunt. 407; Dean *v.* M'Ghie, 12 Moore, 185; 4 Bing. 45; Kerswill *v.* Bishop, 2 Cr. & J. 529; Gardner *v.* Cazenove, 1 H. & N. 423; Willis *v.* Palmer, 6 Jur., N.S. 732.

(*h*) Green *v.* Biggs, 6 Hare, 395; Cato *v.* Irving, 5 De G. & S. 210.

(*i*) The Troubadour, *L. R.*, 1 Adm. 302.

(*k*) Jardine *v.* Leathley, 9 Jur., N. S. 1035; 3 B. & S. 700.

(*l*) 1 & 2 Vict. c. 110, s. 11. Irish Act (3 & 4 Vict. c. 105, s. 19). But the provisions are not applicable to judg-

other officer to whom any writ of elegit or precept in pursuance thereof shall be directed at the suit of any person, upon any judgment then or thereafter to be recovered in any action in a superior court, may make and deliver execution to the party in that behalf suing of all such lands, tenements, rectories, tithes, rents and hereditaments, including copyholds or customary lands and hereditaments, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power (*m*), which he might, without the assent of any other person, exercise for his own benefit, as execution might theretofore be delivered of one moiety of the lands and tenements of any person against whom a writ of elegit was sued out: the hereditaments so delivered to be held and enjoyed, subject to such account in the court, out of which such execution was sued, as tenant by elegit was theretofore subject to in a court of equity; but as to copyhold and customary lands, subject to the due payments and services to the lord of the manor, until satisfaction of which payments and of the value of the services, as well as for the judgment debt, the lands may be held; and provided that, as against purchasers, mortgagees and creditors becoming such before the commencement of the act, the elegit should have no greater effect than an elegit would have had if the act had not passed.

875. The whole estate of the judgment debtor being now charged, it is no longer necessary to describe the lands by metes and bounds, by which means alone the sheriff could ascertain the moiety of which it was formerly his duty to give

ments, &c. entered up after the passing of 13 & 14 Vict. c. 29. And judgments then existing are not to be a charge upon or be executed; or a statutory receiver appointed against lands thereafter acquired, except as provided by the act (sects. 1, 2). But the act did not extend to such chattel interests in lands as might have been taken in execution under a *fi. fa.*, if the act of 3 & 4 Vict. had not passed.

(*m*) Under the old law, a judgment might be defeated by the execution of an earlier power. (See Doe *d.* Wigan *v.* Jones, 10 B. & C. 459; Tunstall *v.* Trappes, 3 Sim. 300.)

possession. Such a description may now be used as would be sufficient in a conveyance (*n*).

876. The act also gives (*o*) the judgment creditor the same remedies in equity against the hereditaments charged, as he would have had in case the judgment debtor had power to charge, and had by writing agreed to charge, the same with the amount of the judgment debt and interest thereon.

A judgment duly registered (**172**) becomes by virtue of this act a direct charge upon the debtor's interest in land, whether that interest be legal or equitable (**135**). It, therefore, binds (*p*) the equitable interest acquired before conveyance, by a purchaser who has accepted the title, even to the extent of interference with the rights of the vendor coming to enforce his lien for unpaid purchase-money; and also (*q*) the interest of a judgment debtor as against purchasers under a decree for sale, in a suit by the creditors of his ancestor; though the judgment were entered up after the commencement of the suit. A covenant to pay a sum of money, to be charged upon all a person's estates, is an estate or interest within the act (*r*); as is also a mortgage debt, so far as the principal or interest are paid out of the rents and profits, or the proceeds of sale: but not interest paid under a covenant (*s*).

Nor is an interest in a share of the proceeds of sale of real estate, devised upon an absolute trust for sale, an estate or interest which will entitle a judgment creditor to a charge upon the land (*t*).

877. Though an equitable interest in a term of years cannot be taken in execution at law (*u*), yet a judgment creditor is entitled, after suing out execution, to a remedy in equity against the equitable interest of his debtor in a term;

(*n*) Doe *d.* Roberts *v.* Parry, 13 M. & W. 356.

(*o*) Sect. 13. In Ireland (3 & 4 Vict. c. 105, s. 22.) But see 13 & 14 Vict. c. 29, ss. 1, 2; and sect. 11 providing that sect. 22 of the 3 & 4 Vict. shall not extend to interests created by securities.

(*p*) 1 & 2 Vict. c. 110, s. 13; Greycoat Hospital *v.* Westminster Improvement Commissioners, 1 De G. & J. 531; 3 Jur., N. S. 1188.

(*q*) Craddock *v.* Piper, 14 Sim. 310.

(*r*) Russell *v.* M'Culloch, 1 K. & J. 313; 1 Jur., N. S. 157.

(*s*) Avison *v.* Holmes, 1 J. & H. 530; 7 Jur., N. S. 722.

(*t*) Thomas *v.* Cross, 2 D. & S. 423; 11 Jur., N. S. 384.

(*u*) Scott *v.* Scholey, 8 East, 467.

either directly, or by the indirect process of compelling the trustee to convey the legal interest to the debtor, so as to make it available at law. An execution creditor, under an unregistered judgment, has therefore been held (*x*) entitled in equity to a lien upon an equitable interest in a term which had come to the hands of creditors.

878. The rights of judgment creditors, independently of the statute, are purely legal (*y*), and equity only interposes to assist and remove impediments from the legal right, or to protect the property pending disputes at law concerning the title; but does not supply or extend the legal right. Except, therefore, under the statute, the remedy under which is postponed for a year(**135**) from the entering up of the judgment, the creditor cannot have the aid of equity against the debtor's freehold, unless he sue out an elegit, or against his personalty, without a fieri facias (*z*); and a demurrer will lie, unless it be alleged that execution has been sued out (*a*). The objection of the want of an execution cannot be met by putting the case upon the jurisdiction of the court to relieve against fraud (*b*).

879. The judgments of county courts will be aided (*c*) in equity against the equitable chattel interests of the debtor, and will be made liable as if they were legal interests. And in the case of county courts, it being expressly directed that the writ shall bind when placed in the hands of the bailiff, it is not necessary first to issue an elegit.

880. The word "rents" includes annuities (*d*) directed to be raised out of lands. Leaseholds are also bound (*e*); but to make the judgment effectual against them, an elegit must first have been sued out; for under the old law a docketed judgment did not bind leaseholds until elegit (*f*), and a registered

(*x*) Gore *v.* Bowser, 3 Sm. & G. 1; 1 Jur., N. S. 392.

(*y*) Neate *v.* Duke of Marlborough, 3 M. & C. 421.

(*z*) Smith *v.* Hurst, 1 Col. 705; *S. C.* 10 Hare, 30; and see Higgins *v.* York Building Company, 2 Atk. 107; Godfrey *v.* Tucker, 33 Beav. 280.

(*a*) Mitf. Pl. 126, ed. 4; 149, ed. 5.

(*b*) Smith *v.* Hurst, 10 Hare, 30.

(*c*) Bennett *v.* Powell, 3 Dr. 326.

(*d*) Younghusband *v.* Gisborne, 1 De G. & S. 209.

(*e*) Harris *v.* Davison, 15 Sim. 128; Sugd. V. & P. 667, ed. 11; 536, ed. 14.

(*f*) See Burdon *v.* Kennedy, 3 Atk. 739; Westbrooke *v.* Blythe, 3 El. & Bl. 737; 2 C. L. R. 1660.

judgment does not bind any land further or more extensively than a docketed judgment would have done (*g*) (**1303**).

881. The words "rectories" and "tithes," though literally applicable to ecclesiastical benefices, do not under this statute apply to them. The charging of ecclesiastical benefices in England was prohibited by 13 Eliz. c. 20; which statute, having been repealed by 43 Geo. 3, c. 84, was revived on the repeal of that act by 57 Geo. 3, c. 99, and still remains in force. All direct charges on such benefices are therefore void (**393**); and a judgment creditor of a beneficed clergyman can only make the profits of the benefice applicable to the discharge of his debt by means of a sequestration, issued by the bishop under a writ directed to him, sued out by the judgment creditor (*h*), and which operates from the time of publication (*i*), by reading it in the church during divine service, and afterwards at the church door, and under which the creditor becomes entitled to receive, through the sequestrators, the profits of the benefice, after providing for the duties of the church, until the debt and costs of the sequestration are satisfied.

When, therefore, the warrant of attorney, or other instrument upon which the judgment is entered up, points expressly (*k*) or by inevitable consequence (*l*) to a charge upon the benefice, it will be void; though not where the application of the profits is only a possible consequence of the transaction; for in the one case the security would absorb all the profits of

(*g*) 2 & 3 Vict. c. 11, s. 5.

(*h*) Commissions of sequestration of ecclesiastical benefices and their profits have also been directed by the Court of Chancery to the bishop, in order to enforce orders of that court for the payment of money; though having regard to the statute of Elizabeth, the validity of the proceeding appears latterly to have been doubted. (Norton *v.* Pritchard, cited from Reg. Lib. 2 Sm. & G. 455; and Allen *v.* Williams, reported there.) In Ireland (in the Exchequer) a receiver was refused where there was no sequestrator and the bishop was not a party, on the ground that the court or a receiver could not settle the allowances or otherwise provide for the cure of the benefice. (M'Curdy *v.* Chichester, 2 Jo. 358.)

(*i*) Doe *d.* Morgan *v.* Bluck, 3 Camp. 447; Waite *v.* Bishop, 1 C. M. & R. 507; but see per Bayley, J., Barnett *v.* Apperley, 6 B. & C. 630.

(*k*) Newland *v.* Watkin, 9 Bing. 113; and 1 L. J. (N. S.) C. P. 177; Flight *v.* Salter, 1 Barn. & Ad. 673; Shaw *v.* Pritchard, 10 B. & C. 241.

(*l*) Alchin *v.* Hopkins, 1 Bing. N. C. 99; Long *v.* Storie, 3 De G. & S. 308.

the benefice, while in the other the warrant of attorney produces a sequestration, which of necessity provides for the serving of the cure (*m*). A warrant to enter up judgment as a collateral security for a debt charged upon a benefice is therefore not void (*n*) merely because the bond, upon which it authorizes judgment to be given, purports to be a security for an annuity, charged by a deed of even date upon the benefice; the terms of the charging deed not being by the mere reference incorporated in the warrant of attorney.

It was, however, contended, that the statute of Elizabeth was by implication repealed by sect. 13 of 1 & 2 Vict. c. 110, inasmuch as judgments are thereby made charges upon property, which by virtue of the words "rectories" and "tithes" was said to include ecclesiastical benefices; and the same remedies it was argued were given against the debtor's benefice as the creditor would have had, if the debtor had had power to charge, and had by writing agreed to charge the benefice with the amount of the judgment debt and interest. With which views Lord Cranworth, V. C. agreed, and appointed a receiver of the profits of a benefice at the instance of a judgment creditor of the incumbent (*o*). But this decision, after being doubted (*p*), was reversed (*q*) by the Court of Appeal in Chancery.

882. It has also been held that the 19th section of the corresponding Irish Act (3 & 4 Vict. c. 105), in which the same words are used as in the English Act (sect. 13), does not enlarge the description, or change the character of the estates which might be extended upon an elegit under the statute of Westminster, or the Statute of Frauds (*r*). And both the M. R. and the Lord Chancellor in Ireland refused to extend a receiver over tithe rent charge and other ecclesiastical dues, at the instance of a judgment creditor of a rector, under sect. 21, which authorizes the appointment of a receiver over any lands, tenements, "rectories, tithes," annuities, rents,

(*m*) Aberdeen *v.* Newland, 4 Sim. 281; Moore *v.* Ramsden, 7 Ad. & El. 898; 4 Barn. & Ad. 608.

(*n*) Britten *v.* Wait, 3 Barn. & Ad. 915; Colebrook *v.* Layton, 4 id. 578.

(*o*) Hawkins *v.* Gathercole, 1 Sim., N. S. 63.

(*p*) See Bates *v.* Brothers, 18 Jur. 715; 2 Sm. & G. 509.

(*q*) Hawkins *v.* Gathercole, 1 Jur., N. S. 481.

(*r*) Digby *v.* Irvine, 6 Ir. Eq. R. 149.

or hereditaments made liable by the act to be extended or taken in execution (*s*).

883. As to purchasers, mortgagees or creditors who should have become such before the commencement of the act, no lands, tenements or hereditaments were to be affected by the judgment otherwise than as before the commencement of the act (*t*); and the equitable doctrine whereby protection is given to purchasers for valuable consideration without notice was declared to remain unaffected by the Act. By another act (*u*), the lands were declared not to be bound, as against purchasers and mortgagees without notice, by any judgment, though duly registered, further than they would have been before the act of 1 & 2 Vict. c. 110, by a judgment of a superior court of law duly docketed, according to the then existing law (*x*).

884. As to the operation of judgments against the personal estate of the debtor, the statute 1 & 2 Vict. c. 110, enacts (*y*), that the sheriff or other officer having the execution of any writ of fieri facias to be sued out of any superior or inferior court after the time appointed for the commencement of the act, or any precept in pursuance thereof, is authorized to seize and take any money, Bank of England or other bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money (which last expression includes policies of assurance (*z*)), belonging to the person against whose effects such writ shall be sued out, and to pay and deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and is directed to hold any such cheques, or other instruments or securities, as security for so much of the money directed to be levied as shall not have been otherwise levied and raised. And may sue in his own name for the recovery of the money secured thereby, if and when the time for pay-

(*s*) Vincent *v.* Helsham, 4 Ir. Jur. 213.

(*t*) 1 & 2 Vict. c. 110, s. 13.

(*u*) 2 & 3 Vict. c. 11, s. 5; and see 18 & 19 Vict. c. 15, s. 3.

(*x*) See Doswell *v.* Reece, 11 Jur., N. S. 764.

(*y*) Sect. 12.

(*z*) Law *v.* London Indisputable Life Policy Company, 1 K. & J. 223; Robson *v.* M'Creight, 25 Beav. 272; Stokoe *v.* Cowan, 29 Beav. 637; 7 Jur., N. S. 901.

ment thereof shall have arrived. And the person liable on any such security is discharged from his liability to the extent of any payment to the sheriff or other officer, or of such recovery and levy in execution. The money so to be recovered, or sufficient thereof to discharge the amount directed to be levied, is to be paid to the person suing out the writ, and any surplus, after satisfaction thereof, with sheriff's poundage and expenses, is to be paid to the debtor. But the sheriff or other officer is not bound to sue upon any such cheque or other security, unless the execution creditor shall enter into a bond with two sufficient sureties, for indemnifying him against all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof; the expense of such bond to be deducted out of any money to be recovered in such action (*a*).

885. The property in the goods taken by the sheriff is not by the seizure either vested in the creditor, or divested from the debtor, though the sheriff has in them a special property by virtue of which he may maintain an action. At any time before sale, the debtor by payment of the demand may resume possession, for which the withdrawal of the sheriff only, and no act of re-transfer, is necessary. A result of this suspension of the creditor's rights is, that, after seizure and before sale, the crown under an extent may assert its priority and seize the property (*b*). In the case of chattels real, the property remains in the debtor until the execution of an actual assignment by the sheriff to the purchaser; and the debtor may recover them at law from the execution creditor himself, if he have purchased without an actual written assignment (*c*).

886. The sheriff can only seize goods which are in the possession of the debtor. He cannot take such as are held by

(*a*) See the powers given in almost similar terms by the County Court Act (9 & 10 Vict. c. 95, ss. 96, 97), for the bailiff to seize, and the high bailiff to hold, personal property of the above mentioned kinds; but the power to sue on the securities seized is given to the plaintiff to be exercised in the name of the defendant, or of any person in whose name the defendant might have sued.

(*b*) Giles *v.* Grover, 9 Bing. 128.

(*c*) Doe *d.* Hughes *v.* Jones, 9 M. & W. 372; Playfair *v.* Musgrove, 14 id. 239.

the debtor's trustee (*d*), nor can he seize under this act purchase-money which remains unpaid (*e*).

887. As a general rule, the sheriff can seize only that which can be sold. And this rule remains unaffected by the statute (*f*), except of course as to money, the seizure of which it expressly authorizes. A lien upon goods therefore, being personal only, and continuing no longer than the possession of the holder, is incapable of sale or seizure (*g*).

If the holder of goods have only a limited interest therein, as in the case of goods held on hire for a term, that limited interest may be seized and sold. And if the absolute owner have, as he is bound to do, given notice to the sheriff of the limited interest of the debtor, and the sheriff after notice sell the absolute property, he is liable (*h*) to be sued by the owner. If the debtor be only a trustee of the goods, he may dispute (*i*) the seizure in that character, and the sheriff may interplead.

888. A balance of money in the hands of a late sheriff, arising from a sale under an execution, after payment of the creditors, cannot be taken in execution by the sheriff's successor (*k*), because it is a mere debt from the former sheriff to the debtor; nor can it be taken by the sheriff who made the original seizure, unless (*l*) he had earmarked it by setting it aside as a specific fund, to answer the balance payable under the first execution. Nor can bank notes, or money seized, be made available in the sheriff's hands to satisfy an execution against an execution creditor (*m*); because, like goods of any other description, they do not by the mere seizure become the property of the execution creditor (**885**).

889. If the sheriff have knowledge that rent is due (express notice not being necessary), he cannot be called upon to sell or remove the goods until the rent be paid; and by doing

(*d*) France *v.* Campbell, 6 Jur. 105; Robinson *v.* Peace, 7 Dowl. P. C. 93.

(*e*) Brown *v.* Perrott, 4 Beav. 585.

(*f*) Dean *v.* Whittaker, 1 Car. & P. 347.

(*g*) Legg *v.* Evans, 6 M. & W. 36; 8 Dowl. P. C. 177.

(*h*) Dean *v.* Whittaker, supra; Duffill *v.* Spottiswoode, 3 Car. & P. 435.

(*i*) Fenwick *v.* Laycock, 2 Q. B. 108.

(*k*) Harrison *v.* Paynter, 6 M. & W. 387.

(*l*) Wood *v.* Wood, 4 Q. B. 397.

(*m*) Collingridge *v.* Paxton, 11 C. B. R. 683.

so he becomes liable, under the statute 8 Anne, c. 14, s. 1, to an action by the landlord. The duty of providing for the payment of rent does not fall on the sheriff, but on the execution creditor (*n*).

890. No writ of fi. fa. or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person bonâ fide, and for valuable consideration, before the actual seizure or attachment thereof by virtue of such writ.

Provided that such person had not, when he acquired his title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, undersheriff or coroner (*o*).

891. The Common Law Procedure Act, 1854, provides, that any creditor, who has obtained a judgment in any of the superior courts, may apply to the court or a judge for the oral examination of the judgment debtor, as to what, if any, debts are owing to him, before a master of the court, or such other person as the court or a judge shall appoint; the court or a judge being empowered to order the examination of the debtor, and the production of books or documents in the manner mentioned in the act (*p*); and also to refuse to interfere, where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious (*q*).

892. Upon the ex parte application of the judgment creditor, either before or after such examination, and upon affidavit by himself or his attorney, stating that judgment has been recovered and is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor, and is within the jurisdiction, a judge may order that all debts owing or accruing from such person (who is called the garnishee) to the judgment debtor shall be attached to answer

(*n*) Cocker *v.* Musgrove, 9 Q. B. 223; Riseley *v.* Ryle, 11 M. & W. 16.

(*o*) Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 1).

(*p*) 17 & 18 Vict. c. 125, s. 60.

(*q*) C. L. P. Act, 1860 (23 & 24 Vict. c. 126, s. 28).

the judgment debt; and that the garnishee shall appear before the judge or a master of the court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt (*r*).

893. If in such a case it be suggested by the garnishee, that the debt sought to be attached *belongs to some third person who has a lien or charge upon it* (*s*), the judge may order such third person to appear before him and state the nature and particulars of his claim upon such debt.

894. After hearing the allegations of such third person and of any other person whom by the same or any subsequent order the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of the act of 1854, and he may bar the claim of such third person or make such other order as he shall think fit, upon such terms in all cases with respect to the lien or charge (if any) of such third person and to costs as he shall think just and reasonable (*t*).

895. It is necessary for the application of these acts that there should be an existing debt, notwithstanding the use of the word *accruing;* which is applied to a debt due but payable at a future time. There can therefore be no rule to attach money payable under a verdict for unliquidated damages where judgment has not been signed, because there is no ascertained debt (*u*). But an order for payment of the costs of an interpleader issue has the effect of a judgment, and gives a right to an attachment (*x*).

Rent is a debt which may be attached under the act (*y*), although it is otherwise under the practice of foreign attachment in the Lord Mayor's Court (*z*) (**903**).

(*r*) C. L. P. Act, 1854, s. 61; Irish Act, 19 & 20 Vict. c. 102, s. 63, 1856.

(*s*) *Sic* C. L. P. Act, 1860, s. 29.

(*t*) C. P. L. Act, 1860, s. 30.

(*u*) Jones *v.* Thompson, 1 El., Bl. & El. 63.

(*x*) Hartley *v.* Shanwell, 1 Best & Sm. 1.

(*y*) Mitchell *v.* Lee, L. R., 2 Q. B. 259.

(*z*) Com. Dig. Attachment D.; and see the various other kinds of property

896. The power of attachment being discretionary, a debt will not be attached of which the judgment debtor cannot enforce immediate payment; as where the effect of an order would be to give a preference, in respect of a debt agreed to be paid without priority as between the judgment debtor and other creditors (*a*).

897. The rule of equity, by which a creditor, who has obtained a judgment against the legal personal representative of his debtor, before a decree for the administration of his estate, is entitled to enforce his judgment (**1309**), enables him to recover his debt under this act from a debtor to the estate which is in course of administration (*b*).

898. The claim of the creditor to proceed under the act is not defeated, where the garnishee has been taken in execution for his debt; because the debt of the creditor who resorts to that remedy is not thereby extinguished, but is only suspended (*c*). But it is different where the judgment debtor himself has been taken in execution by the creditor who desires to proceed under the act; for he cannot afterwards issue execution against his debtor's estate (**1478**); and the act only places debts due to the judgment debtor in the same position as his other property, which, independently of it, could be taken in execution (*d*).

899. Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands (*e*).

900. If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth ac-

there mentioned as not subject to the custom of foreign attachment.

(*a*) Kennett *v.* Westminster Improvement Commissioners, 11 Exch. 349.

(*b*) Fowler *v.* Roberts, 2 Gif. 226.

(*c*) Marples *v.* Hartley, Hartley *v.* Shanwell, 7 Jur., N. S. 774; 1 B. & S. 1.

(*d*) Jauralde *v.* Parker, 6 H. & N. 431.

(*e*) C. L. P. Act, 1854, s. 62; Irish Act, s. 64.

cordingly, without any previous writ or process to levy the amount due from such garnishee towards satisfaction of the judgment debt (*f*).

901. If the garnishee dispute his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit; and the proceedings upon such suit shall be the same as nearly as may be as upon a writ of revivor issued under the Common Law Procedure Act, 1852 (*g*).

If the judgment creditor does not proceed by writ under this section, when the garnishee disputes his liability, the latter is entitled to have the attachment dismissed with costs (*h*).

902. Payment made by or execution levied upon the garnishee, under any such proceeding as aforesaid, shall be a valid discharge to him, as against the judgment debtor, for the amount paid or levied, though the proceeding may be set aside, or the judgment reversed (*i*).

But the garnishee will not be fully discharged, if he satisfy the debt otherwise than under the compulsory order of the judge for payment. The mere service of the order under sect. 62 only binds the debt in the hands of the garnishee (*k*), and prevents him from paying it to the judgment debtor, without giving him a lien within the exception in sect. 184 of the Bankruptcy Act, 1849; so that where the garnishee, after service of this order only, gave a promissory note for the amount due to the execution creditor, it was held that the garnishee was not discharged as against the assignees under the subsequent bankruptcy of the judgment debtor (*l*). But

(*f*) C. L. P. Act, 1854, s. 63; Irish Act, s. 65.

(*g*) Id. s. 64; Irish Act, s. 66; Irish Procedure Act, 1853.

(*h*) Wintle *v.* Williams, 3 H. & N. 288.

(*i*) C. L. P. Act, 1854, s. 65; Irish Act, s. 67.

(*k*) Holmes *v.* Tutton, 5 El. & Bl. 65.

(*l*) Turner *v.* Jones, 1 H. & N. 878.

payment of the debt upon service of the order absolute only, and after the registration of a deed of arrangement between the debtor and his creditors under the Bankruptcy Act, 1861 (which places the debtor and the trustees of the deed in the position of a bankrupt and his assignees), will be good against the trustees, as a payment under the order of a court of competent authority, if, being made before notice of the trust deed, the garnishee had no cause to show against the order; and also if being made after notice, the order could not be set aside before payment became necessary to avoid an actual execution (*m*). It seems that if the garnishee have notice of a bankruptcy or trust deed in sufficient time, he ought to show cause under the first order; and that it would not be safe for him to pay without an immediate threat of execution, and without taking any step to get the order set aside, or giving notice to the assignee to do so; and that if payment be properly made by the garnishee, the remedy of the assignees or trustees will be against the execution creditor, who under the bankrupt law is only entitled to a rateable part of the debt (*n*) (**994**).

903. Under the remedy against garnishees, by the custom of the city of London, which corresponds to that given by the Common Law Procedure Act, but does not require that a judgment should have been previously obtained against the debtor whose debt is attached in the hands of the garnishee, it has been held that if the debtor does not raise in the action in the Lord Mayor's Court an objection of which he might take advantage there, he cannot use it in a subsequent action against the garnishee to recover the debt which the latter was compelled to pay under the process of attachment (*o*). But if the proceedings in the Lord Mayor's Court were commenced and carried on against a person who was then dead, as the custom does not warrant such a proceeding, and as there was no person before the court who could plead, the garnishee cannot set up the payment made under the attachment, against

(*m*) Wood *v.* Dunn, L. R., 2 Q. B. 74, reversing id., L. R., 1 Q. B. 77; 36 L. J., Q. B. 27; 35 id. 11.

(*n*) Id. See Bankrupt Law Consolidation Act, 1849, s. 184.

(*o*) Westoby *v.* Day, 2 El. & Bl. 605.

the personal representatives of the debtor, even though administration was taken out before execution, and the administrator might have appeared in the Lord Mayor's Court and have discharged the attachment (*p*).

This custom of foreign attachment in London does not apply to debts, the beneficial interest in which is vested in a person other than the defendant sued in the Lord Mayor's Court, whereof the garnishee has notice (*q*).

Chapter VI. Part 6.—Of the Rights of Sale and Foreclosure.

904. *When the Liability to Sale arises.*
908. *Of the Right to sell under an Express or Statutory Power.*
941. *Of Sale by Judicial Process in the Court of Chancery and therein—*
952. *Of the relative Rights of Foreclosure and Sale.*
971. *Of Sales by the Court of Exchequer for the Recovery of Crown Debts.*
975. *Of Sale by the Court of Admiralty.*
978. *Of Sale by the Court of Bankruptcy.*

904. The incumbered property may become liable to be sold, either by the incumbrancer himself, or by judicial process:

By the incumbrancer,

1. Under a power incident to his security.
2. By virtue of an express contract with the debtor.
3. Under a statutory power.

By judicial process,

4. Under powers created or modified by statute, or originally vested in the court by which they are exercised.

905. The first kind of power of sale is vested (*r*) in a mort-

(*p*) Matthey *v.* Wiseman, 18 C. B., N. S. 657; 11 Jur., N. S. 603.

(*q*) Westoby *v.* Day; and see Com. Dig. Attachment D.

(*r*) Lockwood *v.* Ewer, 2 Atk. 303; Kemp *v.* Westbrook, 1 Ves. 278; Harrison *v.* Franks, 2 Eq. Ca. Abr. 725; Wilson *v.* Tooker, 5 Bro. P. C. 193; Pothonier *v.* Dawson, Holt, N. P. R. 385; Dyson *v.* Morris, 1 Hare, 413; Pigot *v.* Cubley, 15 C. B., N. S. 701; 10 Jur., N. S. 318; Story, Bailm. §§ 308, 309. So by the Roman law. Mackeldey, Syst. Jur. Rom. s. 316.

gagee or pledgee of a personal chattel, or of stock, a policy of insurance, or other *chose in action*, who, by virtue of the implied contract that the pledge shall be made effectual to discharge the debt (**101**), is entitled without any express power to sell the subject of the security *ex mero motu* (subject to the statutory provisions concerning sales by pawnbrokers (**1030**)), upon non-payment of the debt, when a day has been fixed for the payment, but only after a proper demand and notice (*s*), where no day has been fixed; the mortgagee of a chattel, besides this right, being also entitled to a decree of foreclosure (*t*).

906. But the holder of a chattel under a specific possessory lien (**252**, **1480**), having a mere personal right which continues only during possession, and out of which arises no such contract as is implied in the case of a pawn, cannot sell, but has only a right of retainer (*u*). Therefore, an innkeeper, in answer to an action of trover for the conversion of a horse, cannot set up the defence that the plaintiff being indebted to him for the keep of it in a sum which was beyond the value, he sold it (*x*); unless indeed he can plead the custom of

The Statute Law Consolidation Act of 1861, relating to larceny, after providing for the punishment of fraudulent sales and pledges by agents, bankers and factors, declares, that nothing in the act relating to agents shall affect any mortgagee of real or personal property in respect of any act done in relation to the property comprised in or affected by the mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money which shall be or become actually due or payable by virtue of any valuable security; nor from selling, transferring or disposing of any securities or effects in his possession upon which he shall have any lien, claim or demand entitling him by law to do so, *unless such sale, transfer or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand.* (24 & 25 Vict. c. 96, s. 75; and see s. 76.)

(*s*) Notice that the pawnee will sell, unless a sum, which is greater than the debt, be paid immediately, will not justify a sale. (Pigot *v.* Cubley, supra.)

(*t*) Harrison *v.* Hart, 2 Eq. Ca. Abr.; 6 Comyn, 393; Tancred *v.* Potter, 2 Fonbl. Eq. 261, n. Glanvill indicates an equivalent remedy. (Book 10, cc. 6, 7, 8.) Story says (Bailm. § 310), that the pawnee may file a bill for foreclosure; he must have meant the *mortgagee:* for the special property of the pawnee cannot by foreclosure be turned into an absolute ownership.

(*u*) Thames Ironworks Company *v.* Patent Derrick Company, 1 J. & H. 93; 6 Jur., N. S. 1013; Clark *v.* Gilbert, 2 Bing. N. C. 343. Per Parke, B., Legg *v.* Evans, 6 M. & W. 36.

(*x*) Jones *v.* Pearle, 1 Str. 557. Per Pratt, C. J., in Jones *v.* Thurloe, 8 Mod. 172.

London (*y*), or Exeter (*z*), where if a horse left with an innkeeper without any special bargain for his keep, have eaten beyond his value, the innkeeper, upon a reasonable appraisement, may sell him to satisfy the debt due for his meat only. But in general there is no such right in a person holding a chattel under a lien for money due to him in respect of it; and if he sell it he will become liable in trover for the value. This rule applies also to the lien upon a chattel for unpaid purchase-money (*a*), though it may be otherwise in particular cases; as in the tea trade, where it is the custom for the vendor to be paid partly by an immediate deposit, with the balance at a future time, and the vendor retains the teas, or the warrants which represent them, and on non-payment of the balance may sell and charge the purchaser with the deficiency, together with interest and other charges; though on his bankruptcy the vendor is not bound to sell of his own authority, but may properly apply for an order of the Court of Bankruptcy (*b*).

The lien of the solicitor upon his client's papers, though a general lien, also confers a mere right of retainer (273), and if he sell or concur in the sale of the documents he will be liable in trover (*c*).

907. The mortgagee or pawnee of chattels, who sells either under a special or implied power, is bound to account for the proceeds, to pay over to the owner the surplus of the purchase-money beyond his demand, and the necessary expenses and charges, and to return any unsold part of the security to the mortgagor; and if he attempt to dispose of the money so as to prejudice any person entitled to receive it, he may be ordered to pay it into court, and a receiver may be appointed of the proceeds of any part of the property which may remain unsold (*d*).

(*y*) Jones *v.* Pearle, supra; Robinson *v.* Walter, 3 Bulst. 269; Moss *v.* Townsend, 1 id. 207; Case of an Hostler, Yelv. 66.

(*z*) Cross on Lien, 343.

(*a*) Per Buller, J., in Lickbarrow *v.* Mason, 6 East, 24, n.

(*b*) Ex parte Moffatt, 1 M., D. & De G. 282; affirmed on appeal, Ex parte Twining, id. 691.

(*c*) Clark *v.* Gilbert, 2 Bing. N. C. 353.

(*d*) Story, Bailments, § 343; Wilson *v.* Tooker, 5 Bro. P. C. 193; Com. Dig.

Of the Right to sell under an express Power.

908. An express right in the mortgagee to sell may be created, either by a trust for sale on default of payment at the time fixed, or by a power; and generally, but not necessarily, the trust or power is directed not to be exercised until the expiration of a previous notice to the owner of the equity of redemption, so that he may have a further opportunity of saving the estate by payment of the debt.

Of these forms of security the most usual and the safest is the power of sale; for a trust estate is not affected by the Statute of Limitations, and is subject to the doctrine of conversion and other doctrines, which may cause serious inconvenience both to the mortgagor and the mortgagee (*e*) (**916**).

909. The power will not be affected by a joint demise made by the mortgagor and mortgagee to a receiver, upon trust at the request of the mortgagee during the continuance of the security, and afterwards of the mortgagor, to grant leases, but to permit the mortgagor to receive the rents until default, and after default to receive and apply them in keeping down the interest. The receiver in such a case will be bound to join in conveying to a purchaser from the mortgagee under the power, without the concurrence of the mortgagor (*f*).

910. The power is given as an additional remedy for the recovery of the debt. The use of it therefore by the mortgagee for the purpose of oppression, or to effect the collateral objects of himself or others, will, like any other fraudulent use of a power, be prevented in equity either by restraining or setting aside the sale (*g*). And the mortgagor may recover at law, money which he has paid by compulsion to the mortgagee's solicitor, to prevent the exercise of the power of sale (*h*).

Mortgage, B.; Harrison *v.* Hart, 2 Eq. Ca. Abr. 6.

(*e*) See Anon., 6 Mad. 10; In re Underwood, 3 K. & J. 745.

(*f*) King *v.* Heenan, 3 De G., M. & G. 890.

(*g*) Davey *v.* Durrant, 1 De G. & J. 535; Whitworth *v.* Rhodes, 20 L. J. (N. S.) Ch. 105; Robertson *v.* Norris, 1 Gif. 421; 4 Jur., N. S. 443; Jones *v.* Matthie, 11 Jur. 504.

(*h*) Close *v.* Phipps, 8 Scott, N. R. 381; 7 M. & G. 586.

911. A sale may also be set aside (unless it be protected by the terms of the power), on account of neglect or irregularity in the fulfilment of the conditions under which it ought to have been exercised. Therefore where there was a power to sell by public auction, and if the ship, which was the subject of the power, could not be sold, the mortgagee was to have the sole use and control of it as owner until the debt should be paid, it was considered that there was an agreement by the mortgagee not to sell in any but the specified manner, and a sale by private contract was set aside (*i*).

912. But a stronger case must be made to induce the court to interrupt a sale (when there is only a possibility of damage), than to set it aside afterwards (*k*). The bill for these purposes must clearly disclose the fraud or irregularity in respect of which relief is sought (*l*). The court will not interfere merely on account of an exercise of the legal right, contrary to the wishes or the interests of the mortgagor (*m*). And a *bonâ fide* sale is not invalid, because it was not initiated by the mortgagee, but was made on the application of the purchaser; so that the power was held to have been well exercised by sale to a public company for the purposes of their act, though the notice that they would require the land had been previously given to a later incumbrancer (*n*).

913. The court will prevent a sale which would expose the mortgagor to liability under a contract made prior to the mortgage, and of which the mortgagee had notice (*o*). And will do so at the instance of the person with whom the mortgagor has contracted.

914. The mortgagee, upon tender, even in the auction room, of all that is due, is bound to stop the sale (*p*); and even where (the costs being unascertained, and the security ample) the principal and interest only were tendered, with the

(*i*) Brouard *v.* Dumaresque, 3 Moo. P. C. 457. Probably the result would have been the same if the latter part of the provision had been absent (**1015.**)

(*k*) Kershaw *v.* Kalow, 1 Jur., N. S. 974.

(*l*) Adams *v.* Scott, 7 W. R. 213, V.-C. W.

(*m*) Jones *v.* Matthie, supra.

(*n*) Hill *v.* Great Northern Railway Company, 18 Jur. 685.

(*o*) De Mattos *v.* Gibson, 5 Jur., N. S. 347; 4 De G. & J. 276.

(*p*) Jenkins *v.* Jones, 2 Gif. 99.

knowledge of the purchaser, and refused, the sale was set aside. The pendency of a suit to redeem by a puisné incumbrancer, who has previously given the usual notice to redeem, and has made out a primâ facie title as an incumbrancer, also prevents the exercise of the power (*q*); but it cannot be suspended by the mere filing of a redemption bill (*r*).

915. The mortgagee who sells (except where in judicial sales he obtains leave to bid), or his trustee, are not allowed to purchase the mortgaged estate (*s*); and even the employment by the purchaser of the clerk of the mortgagee's solicitor as a bidder is sufficient to invalidate the sale, and to burthen the estate of the purchaser with the costs of a redemption suit, so far as it was occasioned by the sale (*t*). The same rule prevents the pledgee who sells from buying the pawn (*u*). But a creditor made a trustee for sale, in order to secure the debt, but who has never attempted to execute the trust deed, is considered simply as a creditor with security, and is not disqualified from purchasing (*x*). And a puisné mortgagee, even though under his own security he be a trustee for sale, may buy from the prior mortgagee selling under his power, and may in all respects, as if he were a stranger to the estate, acquire an irredeemable title (*y*), provided he have not availed himself of his position as mortgagee to obtain an undue advantage in the purchase, or otherwise acted malâ fide (*z*).

An execution creditor may also buy the property sold under the execution, the sheriff, and not the creditor, being the seller (*a*).

916. If, besides a stipulation that the power of sale shall

(*q*) Rhodes *v.* Buckland, 16 Beav. 212.

(*r*) Adams *v.* Scott, 7 W. R. 213, V.-C. W.

(*s*) Downes *v.* Grazebrook, 3 Mer. 200; In re Bloye's Trust, 1 Mac. & G. 488.

(*t*) Parnell *v.* Tyler, 2 L. J. (Ch.) N. S. 195.

(*u*) Story, Bailm. § 319.

(*x*) Chambers *v.* Waters, 3 Sim. 42; *S. C.* Waters *v.* Groom, 11 Cl. & F. 684.

(*y*) Shaw *v.* Bunny, 33 Beav. 494; 34 L. J. (Ch.) 257; 11 Jur., N. S. 99, dubitante Turner, L. J.; Kirkwood *v.* Thompson, 2 J. & H. 392; 11 Jur., N. S. 385. And see per Kindersley, V.-C., Parkinson *v.* Hanbury, 1 D. & S. 143, and 2 De G., J. & S. 450, and observations of Turner, L. J., there; but note that the trust there considered was not part of the security.

(*z*) See per Knight Bruce, L. J., in Shaw *v.* Bunny.

(*a*) Stratford *v.* Twynam, Jac. 418.

not be exercised until after the expiration of a certain notice, it be provided that the purchaser shall not be affected by the absence of such notice, and that the mortgagor's remedy shall be by action for damages, the Court of Chancery has no jurisdiction to restrain the sale without notice (*b*). And unless the right to sell be vested in a trustee, whose duty binds him to give notice to both parties, the court will not generally stop the sale on the ground that the required notice has not been given, but will leave the mortgagor to file a bill to impeach the sale, and to give notice to the purchaser that he has done so (*c*).

It appears unnecessary to provide that the notice shall be valid, notwithstanding the disability of the person on whom it is served (*d*); and under the usual provision for service of the notice, by delivering or leaving it at the last place of abode of the person entitled to service, it is sufficient to fix it to the door of the house which answers that description (*e*).

917. The sale, if not made till the expiration of the proper interval after the service or delivery of the notice, is not invalid because the notice declared the intention to sell when that interval had elapsed from its date (*f*); nor because the agreement for sale was made before the expiration of the notice, if the agreement were conditional upon non-redemption in the meantime (*g*).

918. It is usual and proper to provide that a purchaser shall not be affected by express knowledge that the notice required by the power has not been given; for a mere provision, that the purchaser shall not be bound to ascertain or inquire into the existence of notice, will not protect him against actual knowledge that no notice was given (*h*). And

(*b*) Prichard *v.* Wilson, 10 Jur., N. S. 330.

(*c*) Anon., 6 Mad. 10.

(*d*) Tracy *v.* Lawrence, 2 Dr. 403. A notice of dissolution of partnership properly given under the articles is good, though the partner served be insane. (Robertson *v.* Lockie, 15 L. J. (Ch.) 379.)

(*e*) Major *v.* Ward, 5 Hare, 598.

(*f*) Metters *v.* Brown, 9 Jur., N. S. 958; 33 L. J. (Ch.) 97.

(*g*) Major *v.* Ward, supra.

(*h*) Parkinson *v.* Hanbury, 1 Dr. & Sm. 143; 2 De G., J. & S. 450. See Ford *v.* Healy, 3 Jur., N. S. 1116, where Stuart, V.-C., is reported to have considered that the express notice clause would not help the purchaser unless the contract were valid. As this was the

in the absence of this clause a purchaser will not be held to his contract for a simple title under the power of sale, where no notice has been given, and the mortgagor has assigned his interest; though both he and the assignees be ready to ratify the sale (*i*).

919. The power should be so framed that it may be exercised not only by the original mortgagee or mortgagees, but also by those who represent them upon any change of interest. To this end it may safely be given, where there are several mortgagees, to the mortgagees and the survivors and survivor of them, his executors or administrators, and their or his assigns; but it is now a common precaution to vest it also expressly in all persons entitled to give a receipt for the mortgage debt, a form which also calls attention to the rule that it shall be given to the personal, and not to the real, representatives of the mortgagee.

920. The devisees of the surviving mortgagee, where the power is not given to assigns, cannot exercise it though assigns be included among the persons entitled to give receipts, and to dispose of the proceeds of sale (*k*). And the same has been held as to the power of the surviving trustee, where he was not expressly included in the power, but only in the receipt clause (*l*). But the most liberal construction is now given to the power in this respect. And where it was given to two mortgagees, their heirs and assigns, and the security contained a joint account clause, the power was held (*m*) to vest in the surviving mortgagee, on the ground of the assumed intention to make the security of the fee simple available, to the same

question for decision, it does not appear how the clause could be made useful.

(*i*) Foster *v.* Haggart, 15 Q. B. 155; 14 Jur. 757.

(*k*) Bradford *v.* Belfield, 2 Sim. 264; Cooke *v.* Crawford, 13 Sim. 91; Wilson *v.* Bennett, 5 De G. & S. 475; M'Donald *v.* Walker, 14 Beav. 556. And see Stevens *v.* Austen, 7 Jur., N. S. 873. It has been suggested, that where the power is reserved to the mortgagee, his heirs and assigns, it should be expressly vested in every person in whom the legal estate should become vested by devise, conveyance or otherwise. (1 Jarm. Wills, 611, note (*x*), ed. 2.) But this seems unnecessary if the power be properly framed; and, as already observed, it should not be vested in the heirs of the mortgagee.

(*l*) Townsend *v.* Wilson, 1 B. & Ald. 608; but disapproved of by Lord Eldon, Hall *v.* Dewes, Jac. 189.

(*m*) Hind *v.* Poole, 1 K. & J. 383; 1 Jur., N. S. 371.

extent and in the same manner in which the mortgagees were entitled to the money and the land. A power vested in the heirs and assigns of the surviving donee has been long since held to pass to the devisees of the survivor (*n*). And a power to the assigns of a mortgagee, to sell and give receipts, extends to the administrator of the transferee of the mortgage, selling with the concurrence of the assignee of the legal estate (*o*).

Where both first and second mortgagees have power to sell and to give receipts, which shall discharge the purchaser from seeing to the application of the purchase-money, they may concur in a sale; the one giving a receipt only for so much of the purchase-money as will discharge his debt, and the other for the balance (*p*).

921. The continuance of the power, upon a transfer of the security, should be provided for. It will not necessarily be extinguished because of the absence of such a provision; and a general assignment of all covenants, provisos, &c., and of all other securities, will carry it (*q*). But on the alteration of a mortgage by a further charge and additional security, without recognition of the power, it was held that, if not extinguished, its existence was so doubtful that the purchaser might recover back his deposit (*r*).

Care should also be taken, lest in transferring the power of sale to a sub-mortgagee, it be not altogether extinguished in the original mortgagee (*s*) (**1445**).

922. The power may be extended by reference to property not specifically included in it; as where a legal mortgage with power of sale was made of part of an estate, with an agreement to deposit, when executed, the lease of the other part as a further and collateral security for the debt, which was described as secured on the former part of the estate, the power was held to affect the part equitably mortgaged (*t*).

(*n*) Titley *v.* Wolstenholme, 7 Beav. 425.

(*o*) Saloway *v.* Strawbridge, 1 K. & J. 371; 7 De G., M. & G. 594.

(*p*) M'Carogher *v.* Whieldon, 34 Beav. 107.

(*q*) Young *v.* Roberts, 15 Beav. 558.

(*r*) Curling *v.* Shuttleworth, 6 Bing. 121.

(*s*) See Cruse *v.* Nowell, 25 L. J. (Ch.) 709.

(*t*) Ashworth *v.* Mounsey, 3 C. L. R. 418; 9 Exch. 175.

923. A provision in a trust for sale of an equity of redemption, that the purchase-money shall be applied in payment of the prior mortgage, allows a sale subject to that mortgage where the purchase-money is not sufficient to discharge it (*u*).

924. If only authorized to sell by public auction the mortgagee cannot sell privately; but where either mode of sale is permitted, a private sale, even without advertisement, is good, so that it be made bonâ fide and for a fair price (*x*).

925. The mortgagee should avoid the use of unnecessarily stringent conditions of sale. Such as are commonly used by conveyancers are, as a general rule, safe for mortgagees, who will not however be restrained from adding such further conditions, adapted to the state of the title, as may be reasonably used in the disposal of his property by a prudent owner, anxious to protect himself against the risk and expense of litigation; a risk which it is as much for the benefit of the mortgagor as of the mortgagee to avoid, and the proper avoidance of which outweighs the possible diminution in the number and value of the biddings which may be caused by the conditions (*y*).

926. He should adhere strictly to the terms of his power, being liable in damages to the mortgagor for any loss occasioned by irregularity in this respect; and if a purchaser buy with notice that the sale was improper, he will not be protected by a declaration that irregularity in the sale shall not affect the purchaser (*z*).

927. The sale must also be effected with proper discretion; for the mortgagee, as a trustee for the persons interested in the equity of redemption, is bound to adopt such means as would be adopted by a prudent owner to get the best price that can reasonably be had (*a*)

928. It has been generally considered, that, unless the

(*u*) Manser *v.* Dix, 3 Jur., N. S. 252.

(*x*) Brouard *v.* Dumaresque, 3 Moo. P. C. 457; Davey *v.* Durrant, 1 De G. & J. 535.

(*y*) Hobson *v.* Bell, 2 Beav. 17; Kershaw *v.* Kalow, 1 Jur., N. S. 974; Falkner *v.* Equitable Reversionary Society, 4 Dr. 352.

(*z*) Jenkins *v.* Jones, 2 Gif. 99.

(*a*) Ferrand *v.* Clay, 1 Jur. 165; Orme *v.* Wright, 3 Jur. 19, 972; Matthie *v.* Edwards, 2 Col. 465; Marriott *v.* Anchor Reversionary Company, 7 Jur., N. S. 155.

mortgagee be specially authorized to accept a mortgage, the sale ought to be only for money in hand, for the power is given to him to be exercised for the recovery of the debt. It has, however, been intimated, that the estate may be sold upon the terms that part of the money shall remain on mortgage where the seller takes the risk and charges himself in account with the mortgagor with the whole purchase-money, even irrespective of a provision that all arrangements made by the mortgagee shall be as binding as if made with the concurrence of the mortgagor (*b*).

The court has refused to set aside a sale by the first mortgagee on the ground that after making preliminary arrangements (but without a binding contract) for an advantageous sale of the property, he bought up the interest of the second mortgagee at a reduced price, without informing him of such arrangements (*c*).

929. A covenant by the mortgagor that he will join in the sale is for the benefit of the mortgagee only, and not of the purchaser (*d*), who is not entitled to claim such concurrence by virtue of the covenant; but he is entitled to a conveyance from the trustee of an outstanding interest which has been declared to be held in trust for better securing the mortgage debt (*e*).

930. Unless excused by the terms of the power, the mortgagee is bound to obtain for the purchaser proper evidence of the facts which entitle him to exercise the power. His unsupported statutory declaration, being the evidence of an interested person, will not be sufficient for the purpose (*f*).

931. The direction as to the disposal of the surplus purchase-money of mortgaged real estate after the death of the mortgagor is variously framed. Sometimes it requires payment to the executors or administrators of the mortgagor; a form which is open to the objection (*g*) that it is not the

(*b*) Davey *v.* Durrant, 1 De G. & J. 535.

(*c*) Dolman *v.* Nokes, 22 Beav. 402.

(*d*) Corder *v.* Morgan, 18 Ves. 344.

(*e*) Hampshire *v.* Bradley, 2 Col. 34.

(*f*) Hobson *v.* Bell, 2 Beav. 17; 3 Jur. 190.

(*g*) See Davidson's Conv. vol. 2, p. 561, ed. 2.

office of the mortgagee to change the equities of the persons entitled subject to the mortgage, *i. e.*, to effect a conversion beyond what is necessary for realizing the mortgage debt. And it has been long since decided, that although the surplus will belong to the personal representative of the mortgagor, if the sale took place during his life, it will, notwithstanding such a direction, pass to his real representative, if the sale were made after his death; because, as the land was unconverted at his death, the money will follow it (*h*). The heirs and assigns are sometimes pointed out by the power as the recipients (*i*): but if the mortgagor by his will should effect an absolute conversion of his real estate, this form will be no more correct than the other; for the above decision shows that the money is ultimately bound by the actual equities, and not by the terms of the deed. A third and somewhat elaborate declaration gives the surplus to the executors, administrators or assigns of the mortgagor, if the sale shall take place during his life, but to his heirs or assigns if it shall happen after his death; but this also may be rendered nugatory by the will of the mortgagor. Lastly, the surplus may be directed to be paid to the mortgagor, his heirs, executors, administrators or assigns, according to their respective rights and interests therein. This also has been objected to because it throws upon the mortgagee the responsibility of judging who is the person entitled. But that is done by the law, not by the deed. This form, which has been adopted by the legislature in the statutory power which will presently be considered (**933**), does not attempt to lay down any direction which circumstances may render abortive. If no complication arise the law is plain; and the Trustee Relief Act affords complete safety where the title to the surplus money has become doubtful.

932. If the surplus purchase-money remain unproductive in the hands of the selling mortgagee, in consequence of

(*h*) Wright *v.* Rose, 2 Sim. & St. 323; Bourne *v.* Bourne, 2 Hare, 35; In re Smith, 7 Jur., N. S. 903. But in the latter case, on the death of the heir or devisee, it will pass to his personal representative, who may recover it from the mortgagee as money had and received. (Hardy *v.* Felton, 14 L. T. 346.)

(*i*) See David's Conv., supra.

notice from persons interested not to part with it pending disputes as to the title to it, he is not chargeable with interest (*k*).

933. The most important of the statutory powers of sale is that by which, unless the power be negatived by express declaration in the security, and subject to any variations or limitations contained in it, mortgaged real and leasehold estates may be sold by the mortgagee, in the manner and under circumstances similar in many respects to those under which the ordinary power of sale, vested in the mortgagee by the mortgage deed, may be exercised. It is in the following terms (*l*):—Where any principal money is secured or charged by deed on any hereditaments of any tenure (*m*), or on any interest therein, the person to whom such money shall for the time being be payable (**919**), his executors, administrators and assigns, shall at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium or any insurance, which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have, amongst other powers, operating to the same extent as if they had been in terms conferred by the person creating the charge, a power to sell or concur with any other person in selling the whole or part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time in like manner.

Receipts for purchase-money given by the person or persons exercising the power of sale given by the act shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money (*n*).

(*k*) Mathison *v.* Clark, 25 L. J. (Ch.) N. S. 29.

(*l*) 23 & 24 Vict. c. 145, ss. 11, 32.

(*m*) The act therefore does not apply to hereditaments which are not the subject of tenure—such as personal annuities descending to the heir. (Morgan, Stat. Jur. 312, ed. 3.)

(*n*) Sect. 12.

No such sale shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers, the title of the purchaser shall not be liable to be impeached on the ground that no case has arisen to authorize the exercise of such power, or that no such notice as aforesaid has been given; but any person damnified by any unauthorized exercise of such power shall have his remedy in damages against the person selling (*o*).

The money arising from any sale effected as aforesaid shall be applied by the person receiving the same as follows: first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal monies then due in respect of such charge: and the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators or assigns, as the case may be (*p*) (931).

The person exercising the power of sale shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person creating the charge had power to dispose of; except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser in such deed (*q*).

At any time after the power of sale shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed,

(*o*) Sect. 13.
(*p*) Sect. 14.
(*q*) Sect. 15.

surrendered or assigned to and were then vested in him, for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made (*r*).

934. The statute applies only to such instruments as were executed after it was passed (*s*); and such of its provisions as affect the powers of mortgagees, apply only to mortgages and charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt (*t*) (**1323**).

935. The statutory power, though valuable where the power of sale has been omitted from the security, is in several respects less convenient than an express power properly framed, and some of its provisions are considered to be objectionable. If, as is usual, the interest on the mortgage be payable half-yearly, it seems doubtful whether the statutory power can be exercised till at least eighteen months have expired from the date of the security. The interest must have been in arrear for six months, and six months' notice must have been given; and in the absence of a provision that the notice may be given before the interest has actually fallen into arrear for six months, an exercise of the power depending upon such a notice could hardly be considered safe.

936. The purchaser's title is protected only where no case has arisen to authorize the exercise of the power, and where no notice has been given. The act is silent as to an improper exercise of the power after it has arisen, and which is irregular, otherwise than by the absence of notice; nor does it protect the purchaser where he has notice of the absence of notice, or of other irregularities; and it gives the person damnified an express remedy in damages only where the exercise of the power was unauthorized, but none where, being authorized, it

(*r*) Sect. 16.
(*s*) Sect. 34.
(*t*) Sect. 24.

was improperly exercised either by absence of notice or otherwise.

937. The act also vests the property sold in the purchaser for all the estate and interest therein which the creator of the charge had power to dispose of. Hence a mortgagee, who has deliberately accepted a mortgage for a term, may by the statute effect a sale of the fee; a right which he can only acquire by consent in a sale in equity, where if the whole estate be sold the mortgagor is entitled to the difference in value between the term and the fee (*u*): it may also enable a mortgagee of part of an estate to vest in a purchaser a right to hold the title deeds, which he himself could not claim under his contract (**579**).

938. The power of sale contained in the form of mortgage given in the schedule to the "Act to facilitate the proof of title to, and the conveyance of real estates" (*x*), is intended, it is presumed, to operate under 23 & 24 Vict. c. 145.

939. The Merchant Shipping Act, 1854, empowers every registered mortgagee absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there be more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee (*y*) (**316**).

940. The pawnbroker's right of sale is also declared by statute, which provides for its exercise by public auction under certain regulations, on the forfeiture of the goods by non-redemption at the end of a year; a further period of three months being allowed after notice not to sell from the person entitled to redeem, and the overplus of the price is to be paid to the pawnee or his representatives (*z*). The forfeiture, however, upon which the right of sale arises under the statute, does not imply an absolute loss of the right of the owner to

(*u*) See Foster *v.* Eddy, 13 Jur. 761; 18 L. J. (Ch.) N. S. 151; Cutfield *v.* Richards, 26 Beav. 241.

(*x*) 25 & 26 Vict. c. 53. "C. D. shall have power to sell on default of payment of the principal or interest, or any part thereof respectively."

(*y*) 17 & 18 Vict. c. 104, s. 71.

(*z*) 39 & 40 Geo. 3, c. 99, ss. 17, 18, 19, 20.

redeem (*a*). The power of sale is only given to secure the advance with interest. If the pledge be not redeemed at the end of a year and a day, the pawnbroker may sell as soon as he can consistently with the provisions of the act; but if at any time before sale the principal, interest and expenses be tendered by the owner, he is entitled to redeem.

Upon the sale of a forfeited pledge the pawnbroker only undertakes that it is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it (*b*).

Of Sale by Judicial Process; and herein of the relative Rights of Foreclosure and Sale.

941. The relief by judicial sale is intimately connected with the right of foreclosure, for which in many cases in England, and always in Ireland, it is substituted; and it will be convenient to point out in the first place the nature and incidents of the form of suit in which one or other of these remedies are decreed.

942. The mortgagee may commence his suit for foreclosure or sale of the mortgaged estate without taking possession (*c*), which the Court of Chancery will never compel him to do, because he would become liable to an account, but if he have been in possession he ought to state the fact in the bill, and the omission to do so may affect his right to costs (*d*). And where the security is copyhold he may sue without taking admittance (*e*). He is not allowed to debate the title to the estate, because the course of the court in a foreclosure suit is only to take away the equity of redemption, and to leave the plaintiff to such remedy as he has, but not to amend it (*f*).

943. The bill ought to be expressly framed for the relief sought at the hearing. If, indeed, the prayer be merely for

(*a*) Walter *v.* Smith, 5 B. & Ald. 439.

(*b*) Morley *v.* Attenborough, 13 Jur. 282.

(*c*) 5 Ves. 106.

(*d*) Binnington *v.* Harwood, T. & R. 477.

(*e*) Sutton *v.* Stone, 2 Atk. 101.

(*f*) Anon., 2 Ch. Ca. 244. "And this," adds the reporter, "was the true

general relief, and the relief adapted to the case made by the bill be redemption or foreclosure, that relief will be granted (*g*); and though it is said that the proper relief will not be given under the general prayer if the plaintiff pray specific relief to which he is not entitled, the court will give leave to amend by adding parties with the necessary introductory statements, and praying proper relief: though not to the extent of making a new case or putting new matter in issue (*h*). But if the bill make a case which is inapplicable to or inconsistent with the relief prayed at the hearing, as if the bill expressly save the rights of a defendant whom it is afterwards sought to foreclose, it will be dismissed (*i*).

944. A person interested in part only of a sum due on mortgage, cannot sue for foreclosure of a corresponding part of the estate (*k*). His remedy is to make the other mortgagees, if they refuse, as they may, to join in his suit, defendants; upon which an account will be directed of what is due to the plaintiff, and the other mortgagees: and on payment or default, reconveyance or foreclosure will be decreed in the usual way (*l*). Nor can the mortgagee in the same suit obtain a decree for foreclosure and for the benefit of an agreement which he has made with another person interested in the estate, and which is dependent upon the discharge of the equity of redemption (*m*).

945. A mortgagee, who upon the delivery of bills to him in discharge of his debt, has signed a receipt for the mortgage money, and has delivered the deeds, but has not reconveyed the estate, retains his right of foreclosure if the bills be dishonoured, and there be no evidence of an agreement that the

and ancient course, though of late sometimes the contrary hath been done." (30 Car. 2.)

(*g*) Palk *v.* Clinton, 12 Ves. 48.

(*h*) Palk *v.* Clinton, ubi sup.; Watts *v.* Hyde, 2 Ph. 406. See Page *v.* Cooper, 16 Beav. 396. But relief was given under general prayer in Powney *v.* Blomberg, 8 Jur. 746.

(*i*) Hughes *v.* Williams, 3 Mac. & G. 688; and see 1 Hare, 536.

(*k*) Palmer *v.* Earl of Carlisle, 1 Sim. & St. 423. See Remer *v.* Stokes, 4 W. R. 730.

(*l*) Davenport *v.* James, 12 Jur. 827; 7 Hare, 249.

(*m*) Ledbitter *v.* Long, 8 L. J. (Ch.) N. S. 221.

bills were to be taken as an absolute payment (*n*), whether they have proved to be valuable or not; and even if the estate be reconveyed, it seems that by analogy to the right of a vendor (*o*), who has been paid for an estate by bills which are dishonoured (**1471**), and has signed a receipt as for cash; the mortgagee would retain a lien on the estate for his debt.

946. If trustees, authorized to raise money by mortgage, have also authority to give receipts (and such a power is implied where they have power to change and convert the securities (*p*)), it is not necessary, for the mortgagee's title to foreclosure, to show that the money reached the hands of the trustees if they have given a receipt, or that it was duly invested, though it be alleged that the money did not reach their hands, where the mortgagee was no party to the misapplication. And where the original mortgagee is not bound to inquire, his assignee, being a purchaser with the legal estate, is not affected by such a misapplication (*q*).

947. A power of sale in a mortgage does not affect the right of foreclosure (*r*). But a conveyance, charging an estate with a sum of money and interest, and subject thereto in trust for a person therein named, with a power enabling the person, in whose favour the charge was made, to sell, on default in payment after notice, gives no right of foreclosure, there being no condition upon the breach of which a forfeiture can arise (*s*) (**12**); nor can there be a foreclosure, for the same reason, upon a mere trust for sale in favour of the creditor, though there be added covenants for repayment of the debt and interest, and for title, where they are in ac-

(*n*) Teed *v.* Carruthers, 2 Y. & C. C. C. 31.

(*o*) See Frail *v.* Ellis, 16 Beav. 351; Grant *v.* Mills, 2 Ves. & B. 306.

(*p*) Wood *v.* Harman, 5 Mad. 368. And see now stat. 23 & 24 Vict. c. 145, s. 29.

(*q*) Locke *v.* Lomas, 5 De G. & S. 326.

(*r*) See Slade *v.* Rigg, 3 Hare, 35; Wayne *v.* Hanham, 9 Hare, 62. Mortgagee with power of sale filing bill to foreclose not directed *on motion* to sell. MS. Sir J. Leach, April, 1818, in 1 Mad. Ch. Pr., ed. 3, 668. The italics seem to show that the right to foreclose was not then thought to be altogether unaffected by the power of sale.

(*s*) Sampson *v.* Pattison, 1 Hare, 533. See Watson *v.* Waltham, 2 Ad. & E. 485.

cordance with the trusts (*t*). The proper relief in suits to realize such securities is a sale.

948. The Court of Chancery is empowered by statute (*u*) in any suit for foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure, on such terms as the court shall think fit; and, if the court shall so think fit, without previously determining the priorities of incumbrances or giving the usual or any time to redeem. Provided, that if such request be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court for the purpose of securing the performance of such terms as the court shall think fit to impose on the party making such request.

949. The statute gives no absolute right to the parties to require a sale, but a power to the court to decree it, instead of foreclosure; though it is not necessary for the purposes of the act that foreclosure should be prayed by the bill; nor is it an objection to the order that the mortgagee has an express power of sale (*v*). The object of the act is to avoid the delay and expense occasioned by successive redemptions, and the court has a considerable discretion in applying its power (*x*); which it exercises with a view to the general benefit of the persons interested, without injury to any of them: a sale has been accordingly refused upon evidence, that the land was

(*t*) Jenkin *v.* Row, 5 De G. & S. 107; 16 Jur. 1131; Scweitzer *v.* Mayhew, 31 Beav. 37. And see Ex parte Price, 14 Jur. 53.

(*u*) 15 & 16 Vict. c. 86, s. 48. The Court of Chancery in Ireland has a general power in any suit relating to real estate to direct a sale thereof for the purposes of the suit, and to compel delivery to the purchaser. (19 & 20 Vict. c. 77, s. 6.)

(*v*) Hutton *v.* Sealy, 4 Jur., N. S. 450.

(*x*) 16 Beav. 374; Phillips *v.* Gutteridge, 4 De G. & J. 1.

likely to increase in value, and would not fetch its value upon an immediate sale; so that if it were sold, injury would be done to the mortgagor and the *puisné* incumbrancers (*y*). The court has also expressed reluctance to order a sale, unless the complication be such that the common decree cannot be conveniently worked; and therefore (*z*) refused it in a case where there were three mortgages, and the sale was sought by the subsequent incumbrancers only. A conplicated state of affairs has not, however, always been thought a necessary condition for the order for sale (*a*), though a case ought to be made for granting it instead of foreclosure (*b*).

950. A sale has been directed upon the petition of the insolvent mortgagor, and some of his creditors, after a decree by which the insolvent and his assignee had been foreclosed without any opportunity of redeeming; and where a *puisné* mortgagee, after buying up the rights of the assignee and of other incumbrancers, had contracted for a sale without the authority of the court (*c*).

951. Before the passing of the above statute, the Court of Chancery had power in certain cases to sell incumbered estates; and the mode of applying the statutory power being limited by the terms of the act, and the power itself being to a great extent discretionary, it becomes necessary to consider, in what cases, and to what extent, a sale of incumbered property may be decreed in equity independently of the statutory power.

952. The strict right of the legal mortgagee is foreclosure; and, independently of the statute, he had no general right to a sale (*d*), although, in particular cases, he is entitled to that relief.

953. The rights of the equitable mortgagee are less clear; for there has been some difference of opinion as to the effect, in this particular, of mortgages by deposit of title deeds. The principle has, however, been laid down, that where the equit-

(*y*) Hurst *v.* Hurst, 16 Beav. 372.

(*z*) Hiorns *v.* Holtom, 16 Jur. 1077.

(*a*) See Bellamy *v.* Cockle, 18 Jur. 465; Wickham *v.* Nicholson, 19 Beav. 38.

(*b*) Robert *v.* Price, 1 W. R. 303.

(*c*) Laslett *v.* Cliffe, 2 W. R. 536; 2 Sm. & G. 278.

(*d*) 1 Hare, 410.

able security is of such a kind as to entitle its holder to call for a complete legal security (*e*), there the mortgagee's remedy ought to correspond as nearly as may be with that of a legal mortgagee, and the decree should be for foreclosure. But where the equitable security is no more than a charge or lien upon the estate, the only proper relief is by sale (*f*).

Now a right to foreclosure clearly belongs to the mortgagee of the equity of redemption, who is entitled to this relief as against the mortgagor and subsequent mortgagees, without redeeming the first mortgagee (*g*), subject to whose mortgage he has the best right to call for the legal estate. And it seems that upon the principle stated above the *puisné* mortgagee has no right to a sale.

The depositee of title deeds is also entitled to foreclosure, where the deposit is accompanied by an agreement to execute a legal mortgage (*h*). It was also generally considered that where this stipulation exists, foreclosure only may be had. But the doctrine has been modified to this extent, that where the agreement is merely to execute a mortgage when required, the creditor may waive his right to the legal security and the relief which would follow it, and may insist upon a sale under the charge (*i*). It seems to be doubtful in practice whether the right to foreclosure belongs to equitable mortgagees with a simple deposit or with a memorandum without an agreement to execute a mortgage; but it is submitted that such mortgagees are fully entitled to foreclosure, for it has been long held that they have a right to call for a mortgage, the deposit being evidence of itself of an agreement to make a legal security, which the court will carry into effect against the mortgagor or any who claim under him with actual or con-

(*e*) Parker *v.* Housefield, 2 M. & K. 421; Footner *v.* Sturgis, 5 De G. & S. 736; Jones *v.* Bailey, 17 Beav. 582.

(*f*) Tipping *v.* Power, 1 Hare, 405; Footner *v.* Sturgis, 5 De G. & S. 736. See Toft *v.* Stephenson, 7 Hare, 1.

(*g*) 3 Hare, 38; Rose *v.* Page, 2 Sim. 471; Richards *v.* Cooper, 5 Beav. 304.

(*h*) Perry *v.* Keane, Coote, App. 582; Pain *v.* Smith, 2 M. & K. 418; Moore *v.* Perry, 1 Jur., N. S. 126; Jones *v.* Bailey, 17 Beav. 582; Cox *v.* Toole, 20 Beav. 145; Underwood *v.* Joyce, 7 Jur., N. S. 566. See also Frail *v.* Ellis, 16 Beav. 351.

(*i*) Matthews *v.* Goodday, 8 Jur., N. S. 90.

structive notice of the deposit (*k*) (604); and several well-known forms of decree (*l*) (one of which is said to have been penned by Lord Eldon himself) accordingly direct, that upon default in payment, the depositee shall be entitled to the premises freed from all equity of redemption, and shall have an absolute conveyance executed by the depositor or owner of the equity of redemption.

In opposition to this view, several *dicta* and decisions are cited by a late eminent writer (*m*). One of the former, by Lord Cottenham, is but the expression of a shadow of a doubt (*n*). In another (*o*), the same learned judge is reported to have said, "What right has an equitable mortgagee by deposit of deeds to ask for a legal mortgage?" And this, Mr. Spence remarks, was cited, without observation, by Sir L. Shadwell, V. C. E. (*p*). But this fact does not show that the latter learned judge meant to express an opinion that a depositee had no right to foreclosure. On the contrary, before citing Lord Cottenham, he said that the equitable mortgagee had no right even to require an assignment; adding, "he may file a bill for foreclosure, according to some authorities, or for a sale, according to others" (*q*). And in a bankruptcy case he is reported to have said, "as a deposit of deeds has been held to amonnt to an equitable mortgage; *which is in fact a right in equity to call for a legal mortgage*" (*r*). And it is to

(*k*) Featherstone *v.* Fenwick, 1784; Harford *v.* Carpenter, 1785; cited 1 Bro. C. C. 269, n. Mr. Spence, however, shows that the Reg. Lib. does not bear out these cases as cited in Browne, and referred to by Lord Eldon, 14 Ves. 607; Birch *v.* Ellames, 2 Anst. 428; Ex parte Wright, 19 Ves. 255. But the terms of the agreement may be such as to exclude the right to a legal mortgage; as where the intention of the deposit was held to be only to secure the depositee against any loss which he might sustain from joining as surety in a promissory note; and no liability having been incurred, he was entitled only to have the nature of the transaction and the purposes of the deposit reduced to writing. Sporle *v.* Whayman, 20 Beav. 607; 24 L. J. (Ch.) N. S. 789.

(*l*) Newton *v.* Aldous, and other cases cited 2 M. & K. 421; and Set. Dec. 211, ed. 2. And see Birch *v.* Ellames, supra; Parker *v.* Housefield, 2 M. & K. 419; Tylee *v.* Webb, 6 Beav. 552; and decision by Turner, V.-C., cited 1 J. & H. 127.

(*m*) 2 Spence, Eq. Jur. 792, n.

(*n*) In Price *v.* Carver, 3 M. & C. 161.

(*o*) Metcalfe *v.* Archbishop of York, 1 Myl. & Cr. 557.

(*p*) In Moores *v.* Choat, 8 Sim. 516.

(*q*) 8 Sim. 515.

(*r*) Ex parte Wise, M. & M. 65.

be observed, that Lord Cottenham in citing the decrees for foreclosure above referred to, though he only decided the collateral question as to the equitable mortgagee's right to six months' time to redeem upon sale, expressed no doubt as to his right to foreclosure; but, on the contrary, dwelt strongly upon his title to remedies, corresponding as nearly as possible to those of the legal mortgagee (*s*).

But whatever may have been Lord Cottenham's view, the *dictum* in question appears to be completely met by the authority of Lord St. Leonards, who, speaking of a deposit with a memorandum, merely expressing the purpose of the deposit, observed, "How can it be said in a court of equity, that he who has an equitable mortgage, *and is entitled at any moment to file a bill to clothe himself with the legal estate,* has not such a right under this enactment as enables him to sustain the present suit?" (*t*). It may be observed, that the remark of Sir J. Wigram, upon which Mr. Spence also relies, that the owner of an equitable lien has no right but by sale (*u*) was not made in a suit for foreclosure, but on behalf of creditors; neither does the word "lien" express, with accuracy, the effect of a deposit of deeds by way of equitable mortgage. In the cases (*v*) in which decrees for sale were made by the same learned judge, it does not appear that the question was discussed; and even admitting the tendency of Sir J. Wigram's opinion to have been in favour of sale, and not of foreclosure, as the proper remedy, these decrees do not show that the latter is improper. It is not contended that foreclosure is the only proper remedy; for it is clear that mere depositees of deeds have been long held entitled to a decree for sale, and that the relief may (*x*) be had against the mortgagor himself or his

(*s*) See Parker *v.* Housefield, 2 M. & K. 419.

(*t*) See Malone *v.* Geraghty, 3 Dru. & War. 246; affirmed 1 H. L. C. 81. And see per Rolfe, B., in Hobson *v.* Mellond, 2 M. & Rob. 342.

(*u*) In Tipping *v.* Power, 1 Hare, 410.

(*v*) King *v.* Leach, 2 Hare, 57; Jordan *v.* Jones, 2 Ph. 170; Whitworth *v.* Gaugain, 1 Ph. 729; 3 Hare, 416.

(*x*) Meux *v.* Ferne; Spring *v.* Allen, cited 2 M. & K. 422; Russel *v.* Russel, 1 Bro. C. C. 269; Meller *v.* Woods, 1 Keen, 16; Pain *v.* Smith, 2 M. & K. 417; King *v.* Leach, 2 Hare, 57; and see 3 M. & C. 161; Prescott *v.* Tyler, 1 Jur. 470; Tipping *v.* Power, 1 Hare, 405.

assignees; and not, as sometimes it seems to have been thought, against the representatives only after his death (*y*). It is submitted, therefore, first, that it is not settled that a mortgagee by simple deposit is only entitled to a sale. It seems rather that by the practice of the court, and perhaps also upon the principles upon which equitable mortgages stand, he is entitled to foreclosure or sale at his option; to the latter by virtue of his equitable charge, and to the former upon the strength of his implied contract for a legal security (*z*). But, secondly, where there is an express contract of that kind, there will be no decree for sale, but for foreclosure only, unless the contract be for a mortgage with power of sale, for then there may be a decree for sale (*a*); though such an agreement or power will not affect the right of foreclosure (*b*). But there can be no sale in respect of a parol agreement to deposit a deed, as such a contract does not amount to an equitable mortgage (*c*).

954. There has been also a difference of opinion as to the rights of judgment creditors. Prior to the statute 1 & 2 Vict. c. 110, s. 13, a judgment creditor could clearly have no foreclosure, for he had but a general charge upon his debtor's land, and had no right even to a sale in the debtor's lifetime (*d*). But a judgment under the above act is a specific

(*y*) Brocklehurst *v.* Jessop, 7 Sim. 438; Arg. 2 Y. & C. 730.

(*z*) And see Matthews *v.* Goodday, 8 Jur., N. S. 90. Since the first edition of this work was published, a strong opinion has been expressed by Wood, V.-C. (but without deciding the point), that a sale is the *only* proper remedy for an equitable mortgagee by deposit without memorandum; one ground of his opinion being, that such securities are chiefly used by commercial men who look to a sale for reimbursement and not to foreclosure; another, that the mortgage, the right to which is supposed to be involved in the claim to foreclose, would, if in the usual form, make the incumbrancer an assignee, which in the case of leaseholds would be inconvenient. (Tuckley *v.* Thompson, 1 J. & H. 126; 29 L. J. (Ch.) N. S. 548.) The author, however, with submission, thinks that, if it became necessary to require the execution of a mortgage, the usual form in the case of leaseholds would be by way of underlease; and the lessor clearly cannot compel the equitable mortgagee to take a legal assignment (28). And in Redmayne *v.* Forster, the equitable mortgagee by deposit of shares in a colliery was held entitled to foreclosure. (L. R., 2 Eq. 467.)

(*a*) Lister *v.* Turner, 5 Hare, 281.

(*b*) Perry *v.* Keane, Coote, App. 582.

(*c*) Ex parte Coombe, 4 Mad. 249.

(*d*) Neate *v.* Duke of Marlborough. 3 M. & C. 407.

charge, and the judgment creditor is entitled to such and the same remedies in equity, against the hereditaments charged by virtue of the act, or any part thereof, as he would be entitled to in case the person, against whom the judgment shall have been entered up, had power to charge, and had by writing under his hand agreed to charge (not mortgage) the same hereditaments, with the amount of the judgment debt and interest thereon. After the passing of this act, sales were constantly decreed at the suit of judgment creditors (*e*); and it was said by Parker, V. C., that no foreclosure could be had upon this form of security, because that is the relief proper to an agreement for a mortgage, and not to a mere charge (*f*). A decree was, however, made for foreclosure, at the suit of a judgment creditor, by Wigram, V. C., in a case (*g*) which afterwards came before Lord Cottenham on another question. The same was done by Lord Romilly, M. R. (*h*), on the ground that the judgment creditor has that which is equivalent to an agreement to execute a legal mortgage, which gives a right to foreclosure. There is, therefore, no difference of opinion as to the principle upon which the judgment creditor's right is founded, but only upon the nature of the interest which is vested in him by the statute. The words which give the creditor the like remedy, as if the debtor had by writing agreed to charge the hereditaments, do not, according to Sir J. Parker's view (*i*), carry the same right to call for a legal security, as is given by an equitable mortgage. But it has been laid down by high authorities, that the statute confers upon the judgment creditor an equitable estate (*k*), and by giving him the same remedy as if the debtor had signed a memorandum, makes him an equitable mortgagee (*l*). It seems, therefore,

(*e*) Clare *v.* Wood, 4 Hare, 81; Carlon *v.* Farlar, 8 Beav. 525; Smith *v.* Hurst, 10 Hare, 30, 50.

(*f*) Footner *v.* Sturgis, 5 De G. & S. 736.

(*g*) Ford *v.* Wastell, 6 Hare, 229; 2 Ph. 591.

(*h*) Jones *v.* Bailey, 17 Beav. 582. Even against the prior mortgagee's application for a sale. (Messer *v.* Boyle, 21 Beav. 559.)

(*i*) See Footner *v.* Sturgis, 5 De G. & S. 736.

(*k*) Per Lord St. Leonards, 1 D. & W. 195.

(*l*) Per Sir G. J. Turner, L. J., 3 De G., M. & G. 530; 17 Jur. 981.

that he has the same right as an equitable mortgagee has to foreclosure.

955. His remedy by sale has been facilitated by a recent statute, not extending to Ireland; which provides (*m*), that every creditor to whom any land of his debtor shall have actually been delivered in execution by virtue of any judgment, statute or recognizance (meaning such only as have been obtained before the passing of the act (*n*)), and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards, while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's (**139**) interest in such land, the petition being served upon the debtor only; and thereupon the court is to direct all such inquiries as to the nature and particulars of the debtor's interest in the land, and his title thereto, as shall appear necessary or proper; and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court, with respect to sales of real estates of deceased persons for the payment of debts, shall be adopted and followed so far as the same may be found convenient and applicable.

If it shall appear on making such inquiries that any other debt due on any judgment, statute or recognizance is a charge on such land, the creditor entitled to the benefit of such charge, whether prior or subsequent to the charge of the petitioner, shall be served with notice of the order for sale, and shall after such service be bound thereby, and shall be at liberty to attend and have the benefit of the proceedings; and the proceeds of the sale shall be distributed among the persons found entitled thereto according to their respective priorities (*o*).

Every person claiming any interest in the land through or under the debtor, by any means subsequent to the delivery of

(*m*) 27 & 28 Vict. c. 112, s. 4 (Judgment Law Amendment Act, 1864.)

(*n*) Re Isle of Wight Ferry Company, 11 Jur., N. S. 279.

(*o*) Sect. 5.

the land in execution, shall be bound by the order for sale and by the proceedings consequent thereon (*p*).

956. Where the property bound by the judgment consists of a railway or other public undertaking of the like nature, the court will not make an order for sale of the whole property, because the public would lose the benefit of the undertaking (**406**); as, for the same reason, it denies foreclosure to the holders of debentures (being mortgages of the undertaking), and limits the remedy to the appointment of a receiver of the tolls and profits (*q*). But under the Judgment Law Amendment Act mentioned above, the court will order a sale of the superfluous lands of the company, subject to the provisions of the Lands Clauses Consolidation Act (*r*); directing, in the first place, inquiries as to the debt, the nature of the lands extended, the interest of the company in them, and the charges thereon (*s*).

957. It seems that the legal or equitable mortgagee has a general right to a sale, where the security is, or is thought to be, scanty (*t*); it is clear, that he may have this relief if he file his bill after the mortgagor's death, stating that the personal estate is deficient; and if the real and personal estate be represented by one person, it is not necessary to pray for an account of the personalty in the first instance (*u*). But it seems that where a sale was desired in a foreclosure suit on account of a defective security, it was necessary to file a supplemental bill (*x*), unless the original bill were taken *pro con-*

(*p*) Sect. 6.

(*q*) Furness *v.* Caterham Railway Company, 25 Beav. 614.

(*r*) 8 & 9 Vict. c. 18, ss. 127—131.

(*s*) In re Hull and Hornsea Railway Company, L. R., 2 Eq. 262.

(*t*) Per Lord Hardwicke, 3 Sw. 208, n., Wiseman *v.* Carbonell, where, although there was a bankruptcy, the sale was upon a bill in equity, the security being "deficient;" 1 Eq. Ca. Abr. 312. The general right, where the security is scanty, is perhaps not quite clear. In Dashwood *v.* Bithazey, Mos. 196, a sale was asked because the security was "defective;" by which it has been thought an imperfect, and not a deficient security was meant; but the context, it is submitted, rather shows that the word was used in the latter sense, and the authority of Lord Hardwicke is not to be lightly passed over.

(*u*) Daniel *v.* Skipwith, 2 Bro. C. C. 154.

(*x*) Nosworthy *v.* Maynard, cited Mos. 196.

fesso, when the decree is according to the statements, without reference to the prayer (*y*).

958. The mortgagee of a reversion (*z*) was also entitled to a sale on account of the unproductiveness of the security; and it is probably for the same reason that this is the proper relief for the mortgagee of an advowson (*a*).

959. But the mortgagee both of an advowson (*b*) and of a reversion (*c*) is entitled to foreclosure; although in the latter case the subject of the security be a chose in action, and the mortgagee has an express power of sale, and is not in possession of the legal interest: and he is not obliged to submit to a sale.

960. If a sale be desired, the mortgagee should pray for payment or sale, and the court will make the usual decree, upon which if default be made the sale will take place (*d*).

961. The lien of the unpaid vendor, and other liens upon real estate, are also enforceable by sale (*e*), when they have been established by the decree of a Court of Equity, binding the persons affected by the lien (*f*); and in the case of the vendor's lien, the produce of the sale after payment of the expenses of re-sale will be applied in discharge of the original purchase-money, with a right of proof against the estate of the vendee, if a bankrupt, for the deficiency; and this right of sale may be enforced against land taken by a public company, even after the undertaking is in operation, notwithstanding the public interest, which, however it may be considered in cases arising between the company and its own creditors, cannot be set up as a ground for taking the property of a stranger without payment (*g*). But the land owner cannot restrain the company from continuing in possession and

(*y*) Dashwood *v.* Bithazey, Mos. 196; and see XXII Cons. Ord. s. 8.

(*z*) How *v.* Vigures, 1 Ch. R. 18 (*33*, ed. 3).

(*a*) Mackenzie *v.* Robinson, 3 Atk. 559.

(*b*) Gardiner *v.* Griffith, 2 P. W. 403; see 3 Atk. 559; Long *v.* Storie, 3 De G. & S. 308.

(*c*) Slade *v.* Rigg, 3 Hare, 35; Wayne *v.* Hanham, 9 Hare, 62.

(*d*) Ponten *v.* Page, 1 Mad. Ch. Pr. 664, ed. 3, V.-C. Plumer, 1816.

(*e*) Hope *v.* Booth, 1 B. & Ad. 498.

(*f*) See A.-G. *v.* Sittingbourne, &c. Railway Company, L. R., 1 Eq. 636.

(*g*) Walker *v.* Ware, &c. Railway Company, L. R., 1 Eq. 195.

using the land for the purposes for which he sold it to them, until payment of the purchase-money (*h*).

962. Other equitable liens may commonly be enforced in the same manner; but a lien upon trust property cannot be so enforced where the effect would be to destroy the object of the trust (*i*).

963. Amongst equitable liens so enforceable may be noted particularly that of the consignee of a West India estate (**204**), which in one instance (*k*) seems to have been considered to be no more than a dormant lien, giving no actual right to a sale of the corpus of the estate. The authorities, however, show that in cases of salvage (**1269**), the creditor is entitled to be reimbursed by sale, although that remedy did not arise out of his original security (*l*), and that the remedy also affects the consignee of West India estates; and where the lien affects a slave compensation fund, the fund may be ordered to be paid to the consignee (*m*). The lien itself is founded upon the principle of salvage (*n*), the estate being kept in cultivation by the consignee's advances; as a leasehold estate is preserved from forfeiture by payment of the ground rent, and a ship and cargo by the last of several advances on bottomry; and in cases of slave compensation funds the advances have often been the means of creating a right to the fund by keeping the slaves together until the claim to compensation arose. The lien will accordingly take precedence of all other incumbrances, including securities to the crown (*o*).

964. It was also the practice in the case of an infant heir or devisee of the equity of redemption (*p*), where it was more

(*h*) Pell *v.* Northampton and Banbury Junction Railway Company, L. R., 2 Ch. App. 100.

(*i*) Darke *v.* Williamson, 25 Beav. 622; 4 Jur., N. S. 1010.

(*k*) See Shaw *v.* Simpson, 1 Y. & C. C. C. 735.

(*l*) Fetherstone *v.* Mitchell, 11 Ir. Eq. R. 35; Locke *v.* Evans, id. 52; Hill *v.* Browne, 6 id. 403; Dru. 426.

(*m*) Morrison *v.* Morrison, 2 Sm. & G. 564. And see In re Tharp, where it was intimated that policies liable to the lien would be sold if necessary, 2 Sm. & G. 578; and Bernard *v.* Davies, 31 Beav. 429; 9 Jur., N. S. 34. And see the decisions in the W. I. Incumbered Estates Court, In re Harriott, Ex parte Pengelley, 8 L. T., N. S. 854; Cust's W. I. I. E. Acts, 271, ed. 2; In re M'Dowall, Id. 300.

(*n*) Per Lord St. Leonards, In re Tharp, supra.

(*o*) In re M'Dowall, Cust, 300, ed. 2.

(*p*) Davis *v.* Dowding, 2 Keen, 245; Scholefield *v.* Heafield, 7 Sim. 667.

beneficial for the infant (and in an early case it was said to be proper) (*q*), to direct a sale, with the consent of the mortgagee (*r*), for payment of debts instead of foreclosure, because a sale would bind the infant but a foreclosure would entitle him to a day to show cause against the decree after he came of age (**1844**); the practice of selling where the court finds it to be for the benefit of the infant, is now followed in the ordinary course of foreclosure suits (*s*); but as to the mortgagee's consent the sale must of course be subject to the provisions of 15 & 16 Vict. c. 86, s. 48 (**948**).

965. The circumstance that the mortgagor acquired an interest in the security, was held to be a reason, both for decreeing a sale, and for making it improper to foreclose. An instance of this was where the mortgagor was one of the mortgagee's executors; and where this happens, if it be apprehended that the mortgagor is insolvent, the other executors should file a bill for a sale (*t*).

966. The assignee under the insolvency of the mortgagor had no right to pray for a sale of the mortgaged estates in a suit for redemption of the several incumbrancers (*u*).

967. There can be no decree of foreclosure against the crown, and as the crown cannot upon a sale be compelled to convey, the course was to direct that the mortgagee should hold and enjoy the estate until the crown should think proper to redeem (*x*), or until the security should be satisfied (*y*), where the mortgagee's interest in the security would allow the making of such an order. If the order could not be so made, and the legal interest was in the crown, the bill was dismissed; but latterly orders for the sale both of freeholds and leaseholds have been made, it being understood that the crown was not pledged to make any grant to a purchaser (*z*). And in a

(*q*) Booth *v.* Rich, 1 Vern. 295.

(*r*) Mondey *v.* Mondey, 1 Ves. & B. 223; Adkins *v.* Graves, 3 L. J., Ch. 62.

(*s*) Redshaw *v.* Newbold, 12 Jur. 833; Cockburn *v.* Aukett, 3 W. R. 641: Clinton *v.* Bernard, Dru. 287.

(*t*) Lucas *v.* Seale, 2 Atk. 56.

(*u*) Chappell *v.* Rees, 1 De G., M. & G. 393.

(*x*) Lutwich's case, cited 2 Atk. 223; Reeve *v.* A.-G., Id.

(*y*) Hodge *v.* A.-G., 3 Y. & C. 342.

(*z*) Hancock *v.* A.-G., 10 Jur., N. S. 557; Sutton *v.* Smith, cited id. note; and see Prescott *v.* Tyler, 1 Jur. 470; 2 id. 870. Account of what is due on security; order for sale and payment of purchase-money into court; mort-

suit for the administration of assets, in which the mortgage was for a term, and the reversion had become vested in the crown, the mortgagee was declared to be at liberty to accept the estate in discharge of his debt, and was declared to be the purchaser thereof, with liberty to apply to the crown for a grant of the fee, and in the meantime to hold absolutely (*a*) (537).

968. Sale may be ordered (*b*) where it is the proper remedy, though foreclosure only be prayed, and though there be no right to foreclosure; but upon a bill asking for a sale only, it was said (*c*) that the plaintiff was not entitled to any other relief; which is probably true as a general proposition, foreclosure being an original and general, and sale a special, right; but in the case last cited the mortgage was for a term, with a trust for a sale of the fee. Now as such a security gave no right to a sale of the term, nor it seems to foreclosure of the fee (11) (though the plaintiff contended for the latter relief), it was probably only meant, in the particular case, that on the general prayer for a sale there could be no foreclosure of the term; the opportunity of foreclosing which was accordingly given to the plaintiff by permission to amend his bill.

969. No sale can be made of a mortgaged estate as against a mortgagee with a paramount title without his express consent; except in foreclosure suits, as provided by 15 & 16 Vict. c. 86, s. 48, the sale can only be subject to his mortgage (*d*).

The course is to decree a sale, free from the mortgagee's security if he concurs, but subject to it if he does not; and if he be a party to the suit, he will be required at once to consent or to refuse (*e*).

970. In Ireland, the decree in a foreclosure suit is always for sale (*f*); but this practice makes no difference in the

gagee to be paid principal, interest and costs. A.-G. to be at liberty to apply for payment of balance after deducting the costs. In Scott *v.* Robarts, 4 W. R. 499, the order, for special reasons, directed foreclosure against mortgagees prior to the crown, and sale if they should not redeem.

(*a*) Rogers *v.* Maule, 1 Y. & C. C. C. 4.

(*b*) Jenkin *v.* Row, 5 De G. & S. 110; 16 Jur. 1131.

(*c*) Kerrick *v.* Saffery, 7 Sim. 317.

(*d*) Langton *v.* Langton, 7 De G., M. & G. 30; 1 Jur., N. S. 1078.

(*e*) Wickenden *v.* Rayson, 6 De G., M. & G. 210.

(*f*) Hutton *v.* Mayne, 3 Jo. & Lat.

form of the bill, which must still seek redemption or foreclosure, or sale, and cannot be maintained if it pray for sale only (*g*). Nor does the Irish form of decree differ in its nature from a foreclosure decree. It is strictly a decree against the estate, and is made in the same form, whether the security affect the estate only, or reserve a personal remedy also against the debtor (*h*).

Of Sale by the Court of Exchequer for the Recovery of Crown Debts.

971. The Court of Exchequer, on the application of the Attorney-General in a summary way, by motion, may order (*i*) that the right and interest of any debtor to the crown, his heirs and assigns, in any lands, tenements or hereditaments which shall be extended by virtue of any writ of extent or dient clausit extremum, or so much thereof as shall be sufficient to satisfy the debt for which the same shall have been so extended, shall be sold as the court shall direct, and be conveyed to the purchaser by the king's remembrancer in the Court of Exchequer, or his deputy, under the direction of the court, by a deed of bargain and sale to be inrolled in the same court; and after conveyance and inrolment, the bargainee, his heirs, executors, administrators and assigns, may hold not only against the extent of the crown, but against the crown debtor or his sureties, and all persons claiming under them, unless by title paramount to and available in law against the extent. And the purchase-monies shall be applied in discharge of the debt to the crown, and of all costs and expenses incurred by the crown in enforcing payment of the debt, as the Court of Exchequer shall order; and the surplus monies, if any, are to be paid to the person or persons who would be entitled to the hereditaments sold, if there had not been a sale thereof under

586; and the Irish Chancery Reports, *passim*.

(*g*) M'Donough *v.* Shewbridge, 2 Ba. & B. 555; Drew *v.* O'Hara, Id. 562, note.

(*h*) Wilson *v.* Lady Dunsany, 18 Beav. 293; 18 Jur. 762; so in Jamaica, Gordon *v.* Horsfall, 5 Moo. P. C. 393.

(*i*) 25 Geo. 3, c. 35, s. 1. A commission to find a debt due to the crown is not necessary for authorizing the issue of these writs; and as to the evidence on which they may be issued, see Crown Suits, &c. Act, 1865, s. 47 (1293).

the order of the court, upon motion or petition, to be made upon such notice to the crown, and to be supported by such affidavits or other proofs as to the court shall seem just and reasonable.

972. The Court of Exchequer is also empowered to make orders touching the production, delivery and custody of the title deeds and writings, in the same manner as if a decree had been made by the court for a sale of the lands of a crown debtor, in execution of a trust created for payment of debts by such crown debtor himself (*k*).

973. Notice should be given to the mortgagee of an application for an order for sale by the crown under an extent, and he ought not to be paid off without a previous reference to ascertain the sum due to him (*l*).

974. The act has been declared by the Crown Suits, &c., Act, 1865, to authorize the sale of any land taken in execution by virtue of any writ or process of execution issued after the commencement of the latter act, by any court of law or equity, for enforcing the payment of any sum of money to or in favour of the crown (*m*) (**1293**).

Of Sale by the Court of Admiralty.

975. The Court of Admiralty has power in all cases of bottomry, salvage and claims for wages, to decree the sale of the ship against which the proceeding is carried on, unless the demands of the successful suitor be satisfied; and the title conferred by the court is recognized by the laws of this and of all other countries, and is valid against the whole world (*n*). But a sale is not decreed at the instance of a bottomry bondholder, until the court is satisfied by perusal of the bond that it is duly executed, and with maritime risk; and although the bond may be invalid at law, yet if it be apparently regular, and not opposed by the owners of the ship, freight or cargo, the court will act upon it (*o*); and the holder having shown a primâ facie title which would entitle him to payment out of

(*k*) 25 Geo. 3, c. 35, s. 2.
(*l*) The King *v.* Coombes, 1 Pr. 207.
(*m*) 28 & 29 Vict. c. 104, s. 50.
(*n*) The Tremont, 1 W. Rob. 163.
(*o*) The India, 9 Jur., N. S. 417.

the proceeds when brought into the registry, may require that any person who claims an interest shall prove it, before the bondholder is called upon to defend his own claim.

A sale obtained on proceedings founded upon a fraudulent bottomry bond is invalid and will be set aside (*p*).

976. A ship under arrest for necessaries may be ordered to be removed from a building-yard and to be appraised and sold, without prejudice to claims or liens upon the proceeds of sale, for rent or other charges, if it be shown by affidavit that the amount of the claim in the suit exceeds the present value of the ship, and that she is deteriorating (*q*).

977. Upon the sale of a ship by order of the Court of Admiralty, for the satisfaction of bottomry or other claims, the title is complete without any delivery of the register. And no order will be made for its delivery against the official agent of a foreign country, who alleges that he detains it under the law of his own country. But the court will order the delivery of the register in the case of a British vessel, because its production at the custom-house may be necessary (*r*).

Of Sale by the Court of Bankruptcy.

978. As to the jurisdiction in bankruptcy (**1836**) for the sale of mortgaged estates, it was formerly necessary both in cases of legal and equitable mortgages, to apply by petition to the Court of Chancery for an order of sale. But by a general order in bankruptcy made by Lord Loughborough in 1794, it was ordered that upon application to the major part of the commissioners by the mortgagee of any part of the bankrupt's estate or effects, the commissioners should inquire whether the person applying were a mortgagee of any part of the bankrupt's estate or effects, and for what consideration, and under what circumstances; and the commissioners were empowered to take the necessary accounts, and to direct a sale. This order was, however, imperfect for want of a sufficient definition of the word "mortgagee." It was held that the commissioners could not sell without the direction of the Court

(*p*) The Justyn, 6 L. T., N. S. 553.
(*q*) The Nordstjernen, Swab. 260.
(*r*) The Tremont, 1 W. Rob. 163.

of Chancery, in the case of an equitable mortgage (*s*), nor even in the case of a legal mortgage where the equity of redemption was not in the bankrupt; so that if there were a second mortgagee who rested on his security, and refused to claim under the commission, or to join in the sale, no order could be made against him (*t*). The present practice is regulated by orders of 1852, by which this difficulty is removed, but which in other essential respects correspond with the order for which they were substituted.

979. The rules of 1852 provide (*u*) that upon application (to be made by motion, supported by affidavit, and on consent of, or service of notice upon, the parties affected) (*x*), by any person claiming to be a mortgagee of, or to have security over any part of the bankrupt's estate or effects, real or personal, and whether such mortgage or security shall be by any deed or otherwise, and whether the same shall be of a legal or equitable nature, the court will inquire whether such person is a mortgagee, or entitled to such security, and for what consideration, and under what circumstances; and if it shall be found that he is such mortgagee, or is entitled to such security, and no sufficient objection shall appear to his title or to the sum claimed by him under such mortgage or security, the court will proceed to take an account of the principal, interest and costs due upon such mortgage or security, and of the rents and profits, dividends, interest or other proceeds received by such person, or by any other person, by his order or for his use, in case he shall have been in possession of the property over which the mortgage or security shall extend, or any part thereof; and the court will then cause notice to be given in the London Gazette, and in such other of the public papers as it shall think fit, when, and where, and by whom, and in what way the said premises or property or the interest therein so mortgaged, or over which the security shall so extend, are to be sold, and that such sale be made accordingly;

(*s*) Ex parte Mountfort, 14 Ves. 606; Ex parte Payler, 16 id. 434; Ex parte Jennings, 2 Sw. 360.

(*t*) Ex parte Jackson, 5 Ves. 358; Ex parte Topham, 1 Mad. 38.

(*u*) Rule 55.

(*x*) Rule 17.

and that the assignees (unless it be otherwise ordered), shall have the conduct of such sale; but it shall not be imperative on any such mortgagee, to make such application. All proper parties are to join in the conveyance to the purchaser (where necessary), as the court shall direct (*y*).

980. The monies arising from the sale are to be applied (*z*) in the first place, in payment of the costs, charges and expenses of the assignees, of and occasioned by the application to the court, and of and attending such sale, and then in payment and satisfaction of what shall be found due to the mortgagee or person so having security, for principal, interest and costs; and the surplus if any will be paid to the assignees. But if the monies to arise from the sale shall be insufficient to pay and satisfy what shall be found due to the mortgagee, or person having security, then he shall be admitted a creditor for such deficiency, and receive dividends thereon rateably with other creditors, but not so as to disturb any dividend or dividends already made.

981. For the better making such inquiry and taking such account, and making a title to the purchaser, all parties are to be examined by the court upon interrogatories or otherwise as it shall think fit, and to produce before the court upon oath all deeds, papers and writings in their respective custody or power, relating to the estate or effects of the bankrupt, as the court shall direct (*a*).

The accounts may be taken by the commissioners and by the registrars of the court in chambers (*b*).

982. The vendor of real estate who has not conveyed (*c*), and the vendor of personalty, who retains the indicia of the property (*d*), has the same right as a mortgagee to an order for sale, and to prove for the deficiency, and without his consent there will be no sale of the estate on the application of a mortgagee of the bankrupt purchaser; nor even of the bank-

(*y*) Rule 56.
(*z*) Rule 57.
(*a*) Rule 58.
(*b*) Orders under the Bankruptcy Act, 1861.
(*c*) Ex parte Gyde, 1 Gl. & J. 323; Ex parte Lord Seaforth, 1 Rose, 306.
(*d*) Ex parte Sheppard, 2 M. D. & De G. 431; Ex parte Twining, id. 691.

rupt's interest in the estate, until the vendor has been served with the petition (*e*).

983. There will be no order for sale if the security be open to suspicion of any taint; as (formerly) of usury (*f*); or if it be for money which cannot properly be secured by mortgage; as the future costs of a solicitor (*g*) (**368**); or if the lender having notice of a trust, lent the money to the trustee for his own purposes (*h*); or where the bankruptcy followed so close upon the deposit as to raise a presumption of fraudulent preference, unless it be rebutted by evidence (*i*). And in such cases, the court always requires satisfactory proof that the security was not made in contemplation of bankruptcy. But the application may be ordered to stand over pending an inquiry into the existence and circumstances attending the creation of the debt and deposit; and to enable the assignees to apply for a delivery of the deeds.

An order for sale was also refused on account of the staleness of the demand, where twelve years had elapsed between the deposit and the application, the bankrupt being dead and there being no written evidence of the debt (*k*).

984. It is not a valid objection to the order for sale, that the period had not expired before which, under the terms of the mortgage, the debt could not be called in; because such a provision has reference to the mortgagee's remedies at the date of the security, when he had the responsibility of the bankrupt as well as of the estate to rely upon: and he cannot be deprived both of interest and of his right to sell (*l*). Nor is the right to a sale affected, in the case of leaseholds, by a lessee's covenant not to assign without the license of the lessor (**399**); though it would be so if the lease were determinable on the committal of an act of bankruptcy (*m*). On

(*e*) Ex parte Wright, 3 M. & A. 49.

(*f*) Ex parte Nunn, 1 Dea. 393.

(*g*) Ex parte Wake, 2 Dea. 352.

(*h*) Ex parte Turner, 9 Mod. 418.

(*i*) Ex parte Wake, 2 Dea. 352; Ex parte Ainsworth, id. 563; 3 M. & A. 451; Ex parte Dewdney, 4 D. & C. 81; Ex parte Morgan, 1 M. D. & De G. 116; Ex parte Clouten, 3 id. 187; but see Ex parte Heathcote, 2 M. D. & De G. 711.

(*k*) Ex parte Jones; In re Oliver, 3 M. & A. 327.

(*l*) Ex parte Bignold; In re Theobald, 3 M. & A. 477.

(*m*) Ex parte Sherman, Buck. 462; Ex parte Drake, 1 M. D. & De G. 539.

an application for a sale of leaseholds the mortgagee will not be ordered to indemnify the assignees against any breach of the covenants: they being at liberty to reject the lease (*n*).

The mortgagee may waive his special power of sale, and apply to the court for an order for sale in his general character of mortgagee (*o*).

985. If a mortgagee who has made a submortgage become bankrupt, the submortgagee may obtain a sale of the bankrupt's interest in the original security (*p*); but not without a previous inquiry as to the amount due if the original security was for an uncertain sum; though leave will be given to enter a claim for the full amount due to the submortgagee pending the inquiry. If after the submortgage the original mortgagee have bought the equity of redemption, and the assignees reject it, the submortgagee may include it in his sale, and the assignees will be bound to convey to the purchaser (*q*).

986. A deposit of deeds is not necessary to enable the equitable mortgagee to obtain an order for sale (*r*), nor is a memorandum of deposit; though the absence of the latter affects his right to costs (**1713**). But if the mortgagee have no memorandum, he must produce clear evidence in support of his debt, and his mere allegation will not be admitted against the affidavit of the bankrupt. Therefore, where the bankrupt denied by his affidavit that the security was for past, as well as for present and future advances, the order for sale was prefaced by a declaration that the deposit was for present and future advances only, and the order reserved the proceeds after payment of such advances, and gave liberty to apply for the purpose of proving the mortgagee's allegation (*s*).

987. Nor is the right to a sale affected either by an imperfection in the memorandum, or in the deposit, provided the

(*n*) Ex parte Fletcher, 1 D. & C. 318.

(*o*) Ex parte Hodgson, 1 Gl. & J. 12; Ex parte Bacon, 2 D. & C. 181; Ex parte Barnes, 3 Dea. 223.

(*p*) Ex parte Mackay, 1 M. D. & De G. 550; Ex parte Powell, De G. 405.

(*q*) Ex parte Tuffnell, 1 M. & A. 621; 4 D. & C. 29.

(*r*) Ex parte Jones, 4 D. & C. 750.

(*s*) Ex parte Martin, 2 M. & A. 243; 4 D. & C. 457.

intention to complete the security be shown. Freeholds and leaseholds have alike been ordered to be sold, where the deposit of the deeds relating to both was complete but the memorandum related to one only (*t*), and where both were specified in the memorandum, but the deeds relating to one only were deposited (*u*) (**44**). Nor is it affected by an arrangement made subsequent to the security, between the mortgagor and a third person, under which the latter acquires an interest in the mortgaged property (*x*). And if an equitable mortgagee take a legal mortgage with notice of the bankruptcy, his right to a sale under the equitable mortgage is only suspended, and revives when the legal security is declared to be inoperative (*y*).

988. But there can be no sale where the security does not bind the estate, or the assignees, as in the case of an agreement to mortgage land in Scotland, which is ineffectual under the law of that country (*z*); or of an instrument which is inoperative for want of compliance with some legal formality—as inrolment (*a*); nor where there can be no proof by the mortgagor for the deficiency; as if the bankrupt be only a purchaser of the equity of redemption, whose covenant for payment does not make him personally liable for the debt to the mortgagee (*b*) (**1334**); nor where the title to the mortgaged property is hampered,—as where it consisted of a share of partnership property subject to a right of preëmption, and required the taking of partnership accounts to ascertain its value (*c*): nor where it cannot be separately sold without injury, as in the case of fixtures in a house which was not subject to the security (*d*): nor where the property was subject to other incumbrances belonging to persons not before the court, and the priorities and validity of which were disputed by the petitioner: sales in such cases being disadvantageous

(*t*) Ex parte Robinson, 1 D. & C. 119.
(*u*) Ex parte Leathes, 3 D. & C. 112.
(*x*) Ex parte Booth, 2 D. & C. 59.
(*y*) Ex parte Harvey, 3 Deac. 547.
(*z*) Ex parte Pollard, 3 M. & A. 340.
(*a*) Ex parte Miller, 3 De G. & S. 553; 18 L. J. (N. S.) Bank. 9.
(*b*) Keightley *v.* Stockdale, 3 De G. & S. 583.
(*c*) Ex parte Broadbent, 1 M. & A. 635; 4 D. & C. 3; Ex parte Attwood, 2 M. & A. 24.
(*d*) Ex parte Sykes, 13 Jur. 486.

to the bankrupt's estate. But in complicated cases the mortgagee may enter a claim for the whole amount of his debt, until the question of right is determined (*e*). And if part only of the property be the subject of litigated rights, the court will order sale of the other part, without prejudice to the right of the applicant against the part in respect of which the order is refused (*f*).

989. Where the equitable mortgagee applying for a sale, is also the petitioning creditor, and the assignee, the order for sale will not be made ex parte, but will be served on the bankrupt and on one of the creditors, with notice that the service is by order of the court (*g*). And where the applicant was the assignee of another estate, the creditors of which were interested in the security, no order for sale was made until the appointment of persons in the nature of assignees to protect such interest (*h*).

990. The mortgagee who applies for a sale must bring before the court all persons with whom deeds relating to the property have been deposited by the bankrupt (*i*).

991. If the property be bought in by the assignees, the mortgagee by applying for a second sale waives all claim against the assignees for any difference in the amount of biddings between the first and second sales (*k*).

992. The court of bankruptcy has no jurisdiction to compel a purchaser to complete the purchase of an estate sold under the General Order, notwithstanding some earlier authorities to the contrary (*l*). And if the proceedings in bankruptcy have been suspended under s. 110 of the act of 1861 by a resolution of the creditors by which the jurisdiction of the court is not specially preserved, the power to order a sale on the petition of a mortgagee is at an end (*m*).

(*e*) Ex parte Bignold; Re Francis, 1 Dea. 510; 3 M. & A. 713.

(*f*) Ex parte Wace, 2 M. D. & De G. 730.

(*g*) Ex parte ———; In re Parker, Mont. & Bli. 394.

(*h*) Ex parte Haines, 4 Dea. 20.

(*i*) Ex parte Burt, 1 M. D. & De G. 191.

(*k*) Ex parte Baldock, 2 D. & C. 60.

(*l*) Ex parte Cutts, 3 M. & A. 549; 3 Dea. 242.

(*m*) In re Carter, L. R., 1 Ch. App. 170.

Chapter VI. Part 7.—Of the Creditor's Right to Prove in Bankruptcy.

993. It is not every kind of security of which a creditor may take advantage on the bankruptcy of his debtor, so as to obtain more than a rateable share of the assets with the other creditors; and when he is entitled to the benefit of his security, he is generally required either to realize his security, and to prove against the estate for any deficiency, or to abandon (*n*) the security and to prove for the whole debt.

994. The securities of which the creditor may take advantage are pointed out by statute (*o*), which provides, that no creditor having security for his debt, or having made any attachment in London or in any other place by virtue of any custom there used of the goods and chattels of the bankrupt, shall receive upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution or extent, served and levied by seizure and sale upon, or any mortgage of, or lien upon, any part of the property of such bankrupt, before the date of the fiat, or the filing of a petition for adjudication of bankruptcy. Provided that nothing shall give validity to any warrant of attorney, cognovit, or consent to a judge's order declared to be null and void by any provision of the act (**151**), nor to give validity to any judgment entered up or under or by virtue of any such warrant of attorney or consent, or to any execution or extent, executed or levied under any such warrant of attorney, cognovit or consent.

995. This provision applies to those cases only in which a creditor has obtained security for a registered and admitted debt, and not to such a case as the payment into court of a sum of money to abide the event of a suit concerning a disputed claim; no debt then arises until judgment, and the creditor is entitled to receive the fund (*p*).

(*n*) As to the relaxation of the rule, that the security must be abandoned before proof, see Re Gwillim, 34 L. T. 55.

(*o*) Bankrupt Law Consolidation Act, 1849, s. 184.

(*p*) Murray *v.* Arnold, 9 Jur., N. S. 461.

996. The secured creditor will not have the benefit of the act under any seizure and sale, unless both have taken place before the date of the fiat, or the filing of the petition for adjudication. He must therefore complete his remedy by an immediate sale (*q*) (**1313**).

997. The word "lien" has received different constructions (**5**). In bankruptcy it has been held to refer to a mere possessory lien to secure the price of labour; and where there was a mortgage of a house, with a provision that on default the mortgagee might enter and seize and sell the goods, and that the effects should then be his absolute property, upon trust for carrying the provisions of the deed into effect, and the mortgagee before the mortgagor's bankruptcy seized, but did not sell; it was held that as the mortgagee after taking possession had by the deed the absolute property, and not a mere lien, the property passed to the assignees (*r*). The decision appears singular, for the absolute property was given for the purposes of the deed only, viz. to secure the debt; and the creditor was therefore a mortgagee, if he had not a lien. But the Court of Queen's Bench has given a larger meaning to the word "lien"; holding that the exception refers to cases in the nature of mortgages or liens by some conveyance, contract, or course of dealing (which is the same as a contract) where some property is in the thing passed, as distinguished from the seizure of bills or notes by the sheriff under 1 & 2 Vict. c. 110, s. 12; or the orders of a judge under the garnishee clauses of the Common Law Procedure Act, 1854 (**891**), which create a security, but no lien under this clause of the Bankrupt Act (*s*).

998. As to the right of proof and retainer, the rule which requires the creditor to elect is considered (*t*) to be a technical rule of bankruptcy, and will not be extended beyond its strict limits. The principle upon which it is founded is, that all creditors should participate equally, and that one ought not

(*q*) Hutton *v.* Cooper, 6 Exch. 159; Young *v.* Roebuck, 2 H. & C. 296.

(*r*) Ex parte Wayman, 1 Bank. & Ins. R. 213.

(*s*) Holmes *v.* Tutton, 5 El. & Bl. 65; Tilbury *v.* Brown, 6 Jur., N. S. 1151.

(*t*) Per Turner, L. J., in Ex parte Thornton, 3 De G. & J. 454.

to retain part of the estate, and at the same time to prove in competition with the others. But it is obvious that this can only be applied when the security is on the estate of the bankrupt himself, and that where it is on the estate of another person, who is only a surety for the debt, no injury is done to the other creditors by allowing the mortgagee to retain his security (*u*). In such cases the proper course, having regard to the equity of the surety, is for the creditor to prove first for his whole debt against the estate of the bankrupt debtor, and then to come upon the security for the deficiency; for it seems that if the pledge be first sold, and the surety have paid nothing before the bankruptcy, he cannot prove in respect of his loss even on filing a bill (*x*) (1800).

999. The exception then to the rule as to election is so well established, that it has been said (*y*) to be almost a maxim in bankruptcy, that a security is never to go in reduction of proof, unless it belongs to the estate against which the proof is tendered. Of the numerous cases in which it is applicable, a simple one is that in which the wife's estate is mortgaged to secure the debt of the husband; or where one partner mortgages his separate estate to secure a debt due from the other (*z*).

And where several persons are jointly indebted to a creditor, who holds a security on the separate property of one of the debtors, though he who has given the security be jointly liable with his co-debtors, yet the separate estate is only surety for the joint estate, and the mortgagee may therefore prove against the latter and also retain his security (*a*).

1000. The exception has also been extended to the case of a joint security, on joint estate, to secure a joint debt, and a joint and several covenant for payment, so as to enable the mortgagee on the bankruptcy of the firm to prove against the separate estate of each partner, without giving up the joint

(*u*) Ex parte Goodman, 3 Mad. 373.

(*x*) Kittier *v.* Raynes, 1 Cox, 105.

(*y*) Per Sir G. Rose, Ex parte Adams, 3 M. & A. 157; Ex parte Parr, 1 Rose, 76.

(*z*) Ex parte Hedderley, 2 M. D. & De G. 487; Ex parte Rodgers, 1 D. & C. 38.

(*a*) Ex parte Peacock, 2 Gl. & J. 27; Ex parte Adams, 3 M. & A. 157.

security, because the subject of the security was not part of the estate against which the proof was made (*b*).

And again, where father and son executed a joint and several bond to a creditor, and the father mortgaged as further security his real estate, which on his death descended to the son, who became bankrupt; it was considered that, apart from any other question, the descent of the mortgaged estate would have brought the case within the general rule; and that though the pledge was not made by the bankrupt, and the property was not his when it was pledged, the mortgage could not have been retained.

But as the other debts of the father, exclusive of the mortgage debt, would have exhausted the estate, so that no beneficial interest passed to the son, the mortgage was allowed to be retained (*c*). The assumption as to the effect of the descent of the estate appears, however, to be in conflict with a decision in a case in which a joint creditor having taken an equitable mortgage from one of his two debtors as security for the joint debt, and the mortgagor having devised the estate to the other debtor, who became bankrupt, it was held that the creditor might both prove and retain; because, though the mortgaged property was vested in the bankrupt, he obtained it by the act of another person, and subject to the prior claims of the petitioner (*d*).

1001. Another principle leads to the same result, where the proof and security relate to a debt contracted without the authority of him who is entitled to recover it; as where a partner in a bank drew out part of a balance standing to the account of the trustees of a will without their authority, and invested it on an unauthorized security. On the bankruptcy of the bankers it was held that the cestuis que trust might prove for the whole balance without giving up the security; both because the security was not part of the bankrupt's estate, and because the persons interested in the trust estate

(*b*) Ex p. Shepherd, 2 M. D. & De G. 204; id. 101; *S. C.* nom. In re Plummer, 1 Ph. 56; Rolfe *v.* Flower, L. R., 1 P. C. 27 (Colony of Victoria); see Ex p. Davenport, 1 M. D. & De G. 313.

(*c*) Ex p. Turney, 3 M. D. & De G. 576.

(*d*) Ex p. Bowden, 1 D. & C. 135.

had a right to pursue and make the most of it without relinquishing the liability of the original debtors (*e*).

1002. It must however be noted, that though the creditor have a security for a joint debt upon the separate estate of one of the joint debtors, yet if there be no creation of a separate debt, he can only prove against the joint estate (*f*); and if the debt be joint and several, the creditor must elect between the joint and separate estates; and electing to prove against the joint estate, he has no preference over other joint creditors against the surplus of the separate estate over the separate debts (*g*).

The exception from the rule against retainer, and full proof, does not apply where it is only in appearance that the security belongs to a separate estate, and therefore was not admitted where the joint debt was secured by shares in a company, which, though joint property, were standing in the separate names of the joint debtors, in compliance with a rule of the company that no shares should be held jointly (*h*): nor where real estate bought with joint funds is used jointly, and mortgaged to secure a joint debt, can it be contended that because the conveyance was made to the partners as tenants in common, there was for the purpose of this exception to the general rule, a security upon the separate estate of each tenant in common (*i*).

1003. The general rule also prevents the creditor from retaining his security, and at the same time proving on a note, part of the consideration for which was interest on a debt covered by the security (*k*).

1004. The proving of the debt without disclosing the security, is an election to abandon it, and not a ground for expunging the proof (*l*); and if the mortgagee have elected to give up the security, and to prove, he cannot—after the sale

(*e*) Ex parte Biddulph, 3 De G. & S. 587.

(*f*) Ex parte Leicestershire Banking Company, De G. 292; Ex parte Lloyd, 3 M. & A. 601; Ex parte Biddulph, supra.

(*g*) Ex parte Bevan, 10 Ves. 106.

(*h*) Ex parte Connell, 3 Dea. 201.

(*i*) Ex parte Free, 2 G. & J. 250.

(*k*) Ex parte Clark, 1 De G., M. & G. 622.

(*l*) Ex parte Rolfe, 3 M. & A. 306; 2 Dea. 422.

of the estate by the assignees, or after doing acts by which he may have influenced the other creditors, such as receiving dividends, signing the bankrupt's certificate, or the like—retract his proof, and obtain the benefit of the security, even if the proof were made by mistake, and he offer to return any dividend which he may have received (*m*); and the mortgagee has been refused permission to abandon his order for sale, with liberty to prove for the deficiency, and to prove for the whole debt, though the order had not been acted on, and he had obtained it in ignorance of his right (*n*).

But if part of the debt have been realized by sale under a decree, and the remainder of the estate be unsaleable, the mortgagee may prove on his bond for the deficiency, upon giving up the remaining benefit of the decree (*o*). And a creditor who has a mortgage for a principal sum, and a further charge secured by the same and other securities, may retain the mortgage for the original debt, and prove for the other debts, upon giving up all the other securities (*p*).

1005. Where the creditor holds for his debt, bills or securities deposited with the debtor by a third person, and of greater value than the amount of the debt due from the bankrupt to himself, the creditor may prove and receive dividends on the full value of those securities, till he has received his own debt in full (*q*).

1006. If before the bankruptcy the bankrupt deposit a bill for valuable consideration but without indorsement, the assignees may be ordered to indorse it; but in a special form, so that they may not be made personally liable (*r*).

1007. Where a surety applies for the sale of property mortgaged to him, as an indemnity against the debt which he

(*m*) Ex parte Downes, 18 Ves. 290; Ex parte Solomon, 1 Gl. & J. 25; Ex parte Eggington, Mont. 72.

(*n*) Ex parte Davenport, 1 M. D. & De G. 513; and see Ex parte Reynal, 2 id. 637; though it was intimated by the Court of Exchequer, that if proof were made in ignorance of the existence of the security, the Court of Bankruptcy would probably give relief. Grugeon *v.* Gerrard, 4 Y. & C. 119.

(*o*) Ex parte Wyly, Vern. & Scriv. 518; Ex parte Greaves, De G. 119.

(*p*) Re Allison, Fonbl. 26.

(*q*) Ex parte Crossley, 3 Bro. C. C. 237; Ex parte Bloxham, 6 Ves. 449.

(*r*) Ex parte Mowbray, 1 J. & W. 448; Ex parte Rhodes, 2 M. & A. 217.

has guaranteed, the proceeds of the sale will not be applied either in payment of the creditor, or for the indemnity of the surety, until so much of the creditor's proof as is equal to the amount of the proceeds has been expunged (*s*).

1008. An annuity creditor who has a policy of insurance cannot prove until the policy be sold (*t*).

When the security for an annuity is sold, after payment of expenses, the arrears due at the date of the bankruptcy are paid (the subsequent arrears not being proveable), then the value of the annuity as ascertained in the bankruptcy, and the deficiency will be the subject of proof (*u*).

1009. A creditor who holds security, and is desirous of voting in the choice of assignees, is entitled to have his security taken at its value, and to prove for the difference at once, without waiting till the property has been sold. If the value be not admitted, an order for its valuation will be made, and where the circumstances admit, the value will be ordered to be taken at the market price of the day (*x*).

1010. The Court of Chancery will not make an order that the assignees of the bankrupt may be declared to have abandoned property equitably mortgaged, even on the consent of the assignees, unless upon evidence showing satisfactorily that the proceedings will be for the benefit of the creditors (*y*).

A mortgagee may apply to the court to stay the certificate of the bankrupt (*z*).

1011. The Bankrupt Law Consolidation Act, 1849, also provides (*a*) that the obligee in any bottomry or respondentia bond, and the assured in any policy of insurance made upon good and valuable consideration, shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends

(*s*) Ex parte Sherrington, 1 M. D. & De G. 195.

(*t*) Ex parte Tierney, Mont. 78.

(*u*) Ex parte Slack, 1 G. & J. 346; Ex parte Kay, 1 Mad. 426.

(*x*) Ex parte Nunn, 1 Rose, 322; Ex parte de Tasted, id. 324; Ex parte Greenwood, Buck. 323; see 12 & 13 Vict. c. 106, s. 140.

(*y*) Ex parte Wright, 1 D. & C. 573.

(*z*) Ex parte Whitchurch, 2 J. & W. 548.

(*a*) Sect. 174.

with the other creditors, as if the loss or contingency had happened before the issuing of the fiat, or filing of the petition for adjudication of bankruptcy, against such obligor or insurer; and the person effecting any policy of insurance upon ships or goods with any person (as a subscriber or underwriter) having become, or becoming bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person so interested is not within the united realm.

1012. Any annuity creditor of any bankrupt, by whatever assurance the annuity be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, is also declared (*b*) to be entitled to prove for the value of such annuity, which is to be ascertained by the court, regard being had to the original price given for the annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof, to the date of the fiat or the filing of the petition for adjudication of bankruptcy.

1013. But it shall not be lawful (*c*) for any person entitled to any annuity, granted by any bankrupt, to sue any collateral surety for the payment of indemnity, until such annuitant shall have proved against the bankrupt's estate for the value of the annuity and for the arrears thereof; and if the surety after the proof pay the amount proved, he shall be thereby discharged from all claims in respect of the annuity; and if the surety shall not (before any payment of the annuity subsequent to the bankruptcy shall have become due) pay the sum so proved, he may be sued for the accruing payments of such annuity, until the annuitant shall have [been] paid or satisfied the amount so proved, with interest thereon at the rate of 4 per cent. per annum from the time of notice of such proof and of the amount thereof being given to the surety; and after such payment or satisfaction, the surety shall stand in the place of the annuitant, in respect of such

(*b*) Sect. 175.

(*c*) Sect. 176.

proof, to the amount so paid or satisfied by the surety, and the certificate of the bankrupt shall be a discharge to him from all claims of the annuitant or surety in respect of the annuity: provided that the surety shall be entitled to credit in account with the annuitant for any dividends received by the annuitant under the bankruptcy, before the surety shall have fully paid or satisfied the amount so proved.

CHAPTER VII.

OF THE PERSONS INTERESTED IN AND WHO ARE NECESSARY OR PROPER PARTIES TO SUITS CONCERNING SECURITIES.

Of the Persons interested in the Equity of Redemption.
1015. *Of the Mortgagor.*
1022. *Of the Assignees in Bankruptcy of the Mortgagor.*
1023. *Of the Assignees of the Equity of Redemption.*
1036. *Of the Devisee and Heir of the Mortgagor.*
1039. *Of the Personal Representative of the Mortgagor.*
Of the Persons interested in the Security and Debt.
1050. *Of the Mortgagee.*
1058. *Of the Assignees and Devisees of the Security and Debt.*
1061. *Of the Heir of the Mortgagee.*
1062. *Of the Personal Representative of the Mortgagee.*
1063. *Of the Persons beneficially interested either in the Equity of Redemption or in the Security and Debt.*
1076. *Of Assignees pendente lite of the Mortgagor and Mortgagee.*

1014. SUBJECT to certain exceptions created by orders of the Court of Chancery and by statute (**1063**), the general rule concerning parties to suits in equity is, that all persons who have an interest apparent on the record in the object of the suit are necessary parties, and no person ought to be made a party who has not such an apparent interest (*a*).

Now the interests of parties to suits relating to incumbered property arise either out of some right in the equity of redemption of the incumbered estate, or in the estate itself and the debt secured upon it in the hands of the mortgagee; and as a general rule all persons who have an interest either in the right of redemption or in the security must be joined, though the result may be the trial of a legal right between parties thus brought before the court for a different purpose (*b*).

(*a*) Calvert on Parties, 13, 91.

(*b*) Evans *v.* Jones, Kay, 39; Spurgeon *v.* Collier; where, on a bill to redeem, it became necessary to decide as

Of the Persons interested in the Equity of Redemption.
Of the Mortgagor.

1015. And, first, as to the mortgagor himself. He, or the owner for the time being of the whole or any share of the equity of redemption, must be present in every suit in which the question of redemption arises between mortgagees; because, after giving liberty to the *puisné* mortgagee to redeem the first, the decree is, that the former in his turn may be redeemed by the mortgagor; in default of which the latter shall be foreclosed (**1764**). But if he be no party to the suit, his right of redemption will remain open, and the first mortgagee will be exposed to another suit (*c*). The mortgagor, however, need not be joined in a redemption or foreclosure suit between the mortgagee and his derivative or sub-mortgagee (*d*).

1016. The presence of the owner of the equity of redemption is also necessary, where part of the estate, which is subject to the first mortgage, is not comprised in the security of the second mortgagee, and even where the equity of redemption of the excluded part is no longer in the hands of the original mortgagor (*e*). For the prior mortgagee must be redeemed entirely, or not at all (**469, 1239**); and the subsequent mortgagee of part of the estate, upon paying off the whole debt, steps into the place of the other as mortgagee of the whole estate, and thereby of necessity acquires the right, and incurs the obligation, of bringing the owners of that estate before the court. It is also incumbent on the mortgagee, where the estate has been sold in lots, to proceed against all the purchasers (*f*).

The rule is the same, where the mortgagee holds securities upon distinct estates, and even for distinct debts of the mort-

to the voluntary character of a post-nuptial settlement; 1 Eden, 55: See Audsley *v.* Horn, 26 Beav. 195.

(*c*) Fell *v.* Brown, 2 Bro. C. C. 276; Palk *v.* Clinton, 12 Ves. 48; and see Ramsbottom *v.* Wallis, Coote, Mort. App. 576; 5 L. J. (Ch.) N. S. 92; Caddick *v.* Cook, 9 Jur., N. S. 454; 32 Beav. 70.

(*d*) Seton, Dec. 422, ed. 3.

(*e*) Palk *v.* Clinton, 12 Ves. 48. See also Jones *v.* Smith, 2 Ves. jun. 372; and cases there mentioned; and Thorneycroft *v.* Crockett, 2 H. L. C. 239.

(*f*) Peto *v.* Hammond, 29 Beav. 91.

gagor, whether the securities be by the same or by different instruments, and whether redemption be sought by an incumbrancer, or by the owner of the equity of redemption, of part of the mortgaged estate or of one of the estates separately mortgaged (*g*) (**1244**).

And the mortgagor of another estate as a collateral security is a necessary party to a suit for foreclosure against the principal mortgagor by virtue of his right to redeem, and thereby to prevent his own estate from being burthened to a greater amount than the estate of his principal is insufficient to satisfy (*h*) (**524**). But the surety is not a necessary party, where he is bound by a personal covenant only, unless he have paid off part of the debt (*i*).

1017. The mortgagor must also be a party to a suit in which the validity of the mortgage is contested (*k*).

1018. If the estate of a married woman be mortgaged, and the right of redemption be reserved to her and her husband, or either of them, she must be made a party (*l*).

1019. If tenant for life of a mortgaged estate mortgage his life interest for a term, if he shall so long live, with a power of sale, he is a necessary party to a bill for redemption of the original mortgage brought by a purchaser under the power of sale, notwithstanding the smallness of his interest; because the mortgage term was carved out of his interest in the equity of redemption (*m*).

1020. If the mortgagor have conveyed his equity to a subsequent mortgagee, the consideration for the sale being the amount due on the several mortgages, and payment thereof by the purchaser, the balance being applied to the discharge of the purchaser's own debt, and a clear intention be shown that he is to take the estate burthened with the debts, his own debt is destroyed, and he, being in the place of the original

(*g*) Ireson *v.* Denn, 2 Cox, 425; Cholmondeley *v.* Clinton, 2 Jac. & W. 134; Ex parte Carter, Ambl. 733.

(*h*) Stokes *v.* Clendon, 3 Sw. 150, n.

(*i*) Newton *v.* Earl of Egmont, 4 Sim. 574; Gedye *v.* Matson, 25 Beav. 310.

(*k*) Thompson *v.* Baskerville, 3 Rep. in Ch. 215. And see Stackhouse *v.* Countess Jersey, 7 Jur., N. S. 359.

(*l*) Hill *v.* Edmonds, 5 De G. & S. 603.

(*m*) Hunter *v.* Maclew, 5 Hare, 238.

mortgagor, may be foreclosed without the presence of the latter (*n*) (**1412**).

1021. If the mortgagor or owner of the equity of redemption become bankrupt (*o*), he should not generally be made a party; for his whole interest, and therefore his right of redemption, will be bound by a decree against his assignees, and if they release the equity he cannot redeem. And bankruptcy, after bill filed and appointment of a creditor's assignee, may be pleaded in bar without an averment that the assignee has accepted leasehold property, the subject of the security (*p*). Charges of fraud, not particularly directed to the matters upon which relief is sought, will not make the mortgagor a less improper party; nor will a general charge against several defendants (of whom he is one) of possession of documents (*q*). Such a charge will be referred to a possession by the defendants according to their rights and interests. And though if an insolvent, having been made a party, were not dismissed, he could not appeal, though a right of redemption was given him by the decree, and though he alleged that there was in fact a surplus (*r*).

And the bankrupt may even be properly joined; for it seems that the right of redemption becomes revested in him upon the assignee's disclaimer; and if the disclaimer be after the filing of the bill, the mortgagor will be properly added as a party (*s*).

But the assignee's disclaimer must be absolute; for if it be coupled with an admission that the bankrupt's estate is vested in them, this admission makes it necessary to bring the assignees to the hearing, and then it will be improper to join the bankrupt (*t*).

If the assignees refuse to proceed, and the creditors file a

(*n*) Brown *v.* Stead, 5 Sim. 535.

(*o*) Kerrick *v.* Saffery, 7 Sim. 317; Lloyd *v.* Lander, 5 Mad. 282.

(*p*) Jones *v.* Binns, 10 Jur., N. S. 119; 33 Beav. 362.

(*q*) Lloyd *v.* Lander, 5 Mad. 282; see King *v.* Martin, 2 Ves. jun. 641.

(*r*) Rochfort *v.* Battersby, 14 Jur. 229; see Wearing *v.* Ellis, 6 De G., M. & G. 608.

(*s*) Singleton *v.* Cox, 4 Hare, 326.

(*t*) Collins *v.* Shirley, 1 Russ. & M. 638, and 9 Sim. 399.

bill for redemption (**546**), the bankrupt it seems should be made a party (*u*).

If the equity of redemption become vested in the crown by forfeiture, the Attorney-General should be joined (*x*).

Of the Assignees in Bankruptcy of the Mortgagor.

1022. The official assignee, under the bankruptcy of the mortgagor, before the appointment of the creditors' assignees, and then the creditors' assignees, in whom alone upon their appointment the property of the bankrupt becomes vested (*y*), are the proper parties to suits in respect of his interest, and he will be bound by decrees against them (*z*). But if they absolutely disclaim by answer and state their readiness to have released the equity, and that all the estate has been distributed, they should not be brought to the hearing; otherwise if, by the disclaimer, they admit having an interest in the estate (*a*).

Nor should the assignees be joined in respect of an estate of which the equity of redemption was settled by the mortgagor for valuable consideration before his bankruptcy (*b*).

The assignee of an insolvent grantor of a rent-charge must be party to a bill for a receiver, though the object of the bill be only to affect the possession, and not the title of the estate (*c*).

The assignees are proper parties to a redemption suit commenced by creditors of the bankrupt, in consequence of the refusal of the assignees themselves to sue, where the creditors make out a case which entitles them to file such a bill (*d*) (**546**).

If the mortgagor's bankruptcy be discovered after issue joined, the plaintiff will be permitted to withdraw his replica-

(*u*) Franklyn *v.* Fern, Barn. 30—32.

(*x*) Lutwich *v.* A.-G., cited by Lord Hardwicke, 2 Atk. 223; Paulet *v.* A.-G., Hard. 465.

(*y*) 24 & 25 Vict. c. 134, ss. 116, 117, &c.

(*z*) Hanson *v.* Preston, 3 Y. & C. 229; Cash *v.* Belcher, 1 Hare, 310; Peake *v.* Gibbon, 2 Russ. & M. 354; Hill *v.* Edmonds, 5 De G. & S. 603.

(*a*) Thompson *v.* Kendall, 9 Sim. 397; Collins *v.* Shirley, 1 Russ. & M. 638; 9 Sim. 399.

(*b*) Steele *v.* Maunder, 1 Coll. 535.

(*c*) Curtin *v.* Darcy, 2 Jo. & Lat. 718.

(*d*) Franklyn *v.* Fern, Barn. 30—32.

tion and amend by joining the assignees (*e*); and in such a case the bankrupt has been allowed to be retained (*f*): but the assignees must be joined (*g*).

Of the Assignees of the Equity of Redemption.

1023. The application to those cases, in which the right of redemption has become the subject of settlement, of the general rule in equity, that it is sufficient to bring the first tenant in tail before the court, has long been recognized. The rule, established for convenience, is said to be founded upon the practice at law, whereby subsequent remainders might be barred by a recovery in which a subsequent remainderman was vouched, without prejudice to the intermediate remainders. But Courts of Equity have gone further in binding subsequent remainders in tail; and, by extending the rule, have avoided the necessity of giving every contingent remainderman a right to open the accounts, and thereby to render foreclosure all but impossible (*h*) (**1551**).

It has, therefore, been laid down, that it is enough to bring before the court the first tenant in tail in being; and if there be no tenant in tail in being, the first person entitled to the inheritance; and if no such person then the tenant for life (*i*).

But where there is an express life estate the remaindermen must be joined (*k*).

1024. The tenant for life (*l*), if there be one, and the intermediate remainderman for life (*m*), must be parties; and if the interests of the latter become vested pending the suit, they must be added as parties.

And if by the death, pending the suit, of the owner of the first estate of inheritance, that interest be determined, the

(*e*) Hanson *v.* Preston, 3 Y. & C. 229.

(*f*) It seems in consequence of some doubt as to the regularity of the bankruptcy.

(*g*) Wood *v.* Surr, 19 Beav. 551.

(*h*) Lloyd *v.* Johnes, 9 Ves. 37.

(*i*) Giffard *v.* Hort, 1 Sch. & Lef. 408; Roscarrick *v.* Barton, 1 Ch. Ca. 218; see Platt *v.* Sprigg, 2 Vern. 304.

(*k*) Sutton *v.* Stone, 2 Atk. 101.

(*l*) Reynoldson *v.* Perkins, Ambl. 564; see Handcock *v.* Shaen, Colles' P. C. 122.

(*m*) Chappell *v.* Rees, 1 De G., M. & G. 393; Gore *v.* Stacpoole, 1 Dow, 31.

owner of the next estate of inheritance, and of the interests prior to his, must be joined.

And so must owners of new interests acquired by the determination of a contingency, and which are not subject to destruction by a prior vested estate of inheritance (*n*).

If the tenant for life be made a party with the tenant in tail, and the latter release after the taking of the accounts, and the passing of the time fixed for redemption, a decree of foreclosure, made absolute against the tenant for life only, will still bind the contingent remainders; the release under such circumstances being equal to an absolute decree (*o*).

1025. Where there are trustees to preserve contingent remainders, however many contingent limitations there may be, it is sufficient to bring the trustees before the court, together with him in whom the first remainder of the inheritance is vested; and all that come after will be bound by the decree, though not *in esse;* unless there be fraud and collusion between the trustees and the first owner of the inheritance (*p*).

1026. The presence of an infant tenant in tail will bind the inheritance as well as if he were adult (*q*).

But a decree against the tenant for life only, where the tenant in tail, being out of the jurisdiction, is not made a party, will not bind him; though it seems such a decree may be had, if the plaintiff will take the risk of being compelled to account again (*r*).

To what extent and in what cases the heirs of a Scotch entail, who enjoy indefeasible estates, are necessary parties to suits touching their interests as such heirs of entail, is a matter upon which it seems no rule has been laid down (*s*).

1027. If there be a mortgage for a term, with a trust for sale of the fee, the trustees, having a legal interest in the estate, are properly joined in the mortgagee's suit for a sale (*t*). But if the trustees have merely the equity of re-

(*n*) Lord Red. 174.

(*o*) Reynoldson *v.* Perkins, Ambl. 564.

(*p*) Hopkins *v.* Hopkins, 1 Atk. 590; Cholmondeley *v.* Clinton, 2 Jac. & W. 133; Pow. Mort. 975, n. (*q*); and Lord Red. 174.

(*q*) Reynoldson *v.* Perkins, Ambl. 564.

(*r*) Fishwick *v.* Lowe, 1 Cox, 411.

(*s*) Fordyce *v.* Bridges, 2 Ph. 507.

(*t*) Kerrick *v.* Saffery, 7 Sim. 317.

demption upon trust to sell and pay off the prior mortgage debt, and hold the surplus for the mortgagor, and the deed be without consideration, the trustees are not necessary parties to a suit by the mortgagee; because this is only a private arrangement made by the mortgagor for his own convenience, and the trustees are but agents, claiming by an instrument which may at any time be cancelled, and under which the mortgagee takes no interest (*u*).

The trustees of persons entitled beneficially under a settlement of a lease are not necessary parties to a suit for redemption, where the settlor, after the assignment to the trustees, has renewed in his own name, and has thereby acquired the whole legal estate (*x*).

1028. Where the mortgagor and mortgagee of leaseholds concur in assigning part of the estate for the residue of the term at a rent, and, apparently, with the intention of making only an underlease, the assignee is not a proper party to a suit for foreclosure in respect of the equity of redemption (*y*), and it was doubted if he were so in respect of the rent reserved.

1029. Partners of the mortgagor who have a right of pre-emption over his mortgaged share, are necessary parties to a suit to foreclose the security (*z*).

1030. The first (*a*), or any subsequent (*b*) mortgagee or incumbrancer, whether of a legal (*c*), or equitable (*d*) estate, who files a bill for foreclosure or sale (*e*), must make every incumbrancer, whose security is subsequent to his own (**1054**), a party to his suit; in order that their successive rights of redemption may be preserved. And if two estates be mortgaged, and the mortgagor afterwards mortgage the equity of redemption of one of them to a second mortgagee, and sell

(*u*) Slade *v.* Rigg, 3 Hare, 35; Garrard *v.* Lord Lauderdale, 3 Sim. 1.

(*x*) Malone *v.* Geraghty, 3 D. & War. 248--261; 1 H. L. C. 81.

(*y*) Edwards *v.* Jones, 1 Coll. 247.

(*z*) Redmayne *v.* Forster, L. R., 2 Eq. 467.

(*a*) Adams *v.* Paynter, 1 Coll. 530; Tylee *v.* Webb, 6 Beav. 552.

(*b*) Johnson *v.* Holdsworth, 1 Sim., N. S. 109.

(*c*) Adams *v.* Paynter, supra.

(*d*) Tylee *v.* Webb, supra.

(*e*) Burgess *v.* Sturges, 14 Beav. 440; Ormsby *v.* Thorpe, 2 Mol. 503.

that of the other to a third person, the original mortgagee in foreclosing must bring forward both the second mortgagee and the purchaser; for he cannot foreclose either of the estates alone, each being equally liable to the debt. Nor will an allegation without proof, that such a purchaser is an assignee for valuable consideration, without notice of the mortgage, bind the second mortgagee, or deprive him of his right to insist upon the presence of the purchaser (*f*). But it seems it would be otherwise if the allegation were admitted or proved.

In the case of a statutory mortgage of tolls, which passes only a share of the tolls, bearing the same proportion to the whole thereof as the money advanced by the mortgagee bears to the whole of the money borrowed, all the mortgagees, whether prior or subsequent, are necessary parties, inasmuch as one cannot sue for payment of the amount due to him without diminishing the fund out of which the others are intended to be paid; and he who takes possession must apply the tolls in payment of the interest of all the mortgages *pari passu* (*g*).

1031. The rule that subsequent incumbrancers are necessary parties applies to judgment creditors and all other creditors who are entitled to redeem (**544**). This was long since said by Lord Alvanley to be the general practice (*h*), but he refused to treat it as indispensable, and it seems not to have been always followed in earlier cases. On the one hand, the joining of all subsequent incumbrancers causes great expense to them, and both expense and inconvenience to the plaintiff, which is especially felt where judgments are numerous (*i*), and gives a dishonest mortgagor the power of shielding off foreclosure by multiplying incumbrances. On the other hand, the omission to bring forward all the subsequent incumbrancers involves yet greater difficulties. A *puisné* incum-

(*f*) Payne *v.* Compton, 2 Y. & C. 457.

(*g*) Mellish *v.* Brooks, 3 Beav. 22; Watts *v.* Lord Eglinton, 15 L. J. (Ch.) N. S. 413.

(*h*) Bishop of Winchester *v.* Beavor, 4 Ves. 314; and see Greswold *v.* Marsham, 2 Ch. Ca. 170; Bird *v.* Gandy, 7 Vin. Abr. 45, pl. 20; 2 Eq. Ca. Abr. 251.

(*i*) This objection is removed by the present practice (**1786**).

brancer who is not a party to the suit may be deprived of his priority by one who is a party, but who holds a security of later date; and if a sale be desired, it is difficult to find a purchaser, who, having notice of incumbrances, the owners of which are not bound by the decree, will risk the being called to account and redeemed by them. Nor is it to be forgotten that before a decree for sale can be acted upon, a subsequent incumbrancer, who has not been made a party to the suit, may render the decree useless by filing a new bill on his own account. Every incumbrancer, too, has a right to be present at the taking of the accounts, lest by mistake or collusion (*k*) between the plaintiff and the mortgagor, his interests may suffer; and if he be unwilling to join in the proceedings, he may procure the bill to be taken *pro confesso* against him. The hardship has been thought to be yet greater upon the prior mortgagee, who, it has been said, ought not to be entangled with any questions which may arise between subsequent mortgagees (*l*); and it has been argued in his favour, that he lent his money upon the expectation, that, by a suit with the mortgagor alone, he might either recover the money or obtain possession of the estate, instead of which, the necessities of his debtor have mixed him up with other creditors, to the increase of his costs and the lessening of his security (*m*). The argument seems to suggest its own answer; for the lender, when he takes his security, knows that his debtor's necessities may lead him to encumber the equity of redemption; and this is simply a part of the mortgagee's risk. The debtor is under no obligation to keep his equity intact for the mortgagee's benefit, and the rights of those to whom it is assigned are entitled to as much attention as his own.

It was accordingly laid down in a well known case (*n*) in Ireland by Lord St. Leonards, with the concurrence of the Chief Justice and Master of the Rolls there, to be at least the right, if not the absolute duty, of the plaintiff to bring

(*k*) See Graves *v.* Wright, cited 1 Dru. & War. 193.

(*l*) Titley *v.* Davies, 15 Vin. Abr. 447, s. 19.

(*m*) Calvert, 187.

(*n*) Rolleston *v.* Morton, 1 Dru. & War. 171.

all subsequent judgment creditors before the court; and it is also clear, that by the practice in England such creditors must be joined even before the end of the year which must expire before the judgment can be enforced (*n*). And as the reasons of this rule were held to apply in principle as well to creditors by judgment, who by force of the Stat. of Westminster had but a general charge upon the lands of the debtor (*o*), as to those whose judgments are now by statute a specific charge in equity upon the lands, it follows that all creditors who have a general charge upon their debtors' lands fall within its provisions.

Except creditors by judgment in a register county where the judgment is not registered under the local act; for the statute 1 & 2 Vict. c. 110, does not make such a judgment a charge upon the land; its effect being only to make every judgment an equitable charge upon land which before the statute might have been taken under an elegit (*p*). And by virtue of an unregistered judgment debt, lands cannot be so taken in a register county (**1303**).

The application of this rule to judgment creditors will of course be modified by the operation of the modern statutes 23 & 24 Vict. c. 38, s. 1, and 27 & 28 Vict. c. 112, s. 1; under the former of which, however, it was held, that a judgment creditor who had issued and registered, but not enforced his execution, had still such an interest in the land that he was a proper party to a suit, though it was instituted more than three months after the registration (*q*). But under the latter act it appears that no creditor under a judgment entered up after the passing of the act will be a necessary party unless he have perfected his judgment by execution (**137, 138**).

Judgment creditors may be added as parties to the suit

(*n*) Rolleston *v.* Morton, supra; and Adams *v.* Paynter, 1 Coll. 530; Harrison *v.* Pennell, 4 Jur., N. S. 682. The earlier practice in Ireland seems to have been different. (Johns *v.* French, 1 Hog. 450; Gordon *v.* Horsfall, 5 Moore, 393.) As to the modern practice there, see Joyce *v.* Joyce, 10 Ir. Eq. R. 130.

(*o*) 3 & 4 Vict. c. 105, s. 22, in Ireland; and 1 & 2 Vict. c. 110, s. 13, in England.

(*p*) Johnson *v.* Holdsworth, 1 Sim. N. S. 106.

(*q*) Appleton *v.* Sturgis, 10 W. R. 312.

by amendment on a motion of course after the cause is at issue (*r*); no issue being tendered by the amendment.

1032. If pending the suit, the plaintiff receive notice of a subsequent incumbrance, he must make the owner thereof a party to bind his rights; and where notice was given before decree, the judgment creditor had liberty to surcharge and falsify. And, where the general rule cannot be acted upon, for want of notice by the plaintiff of the subsequent incumbrances, it may be stated, but (from the imperfect character of the early reports) with caution—

I. That if the plaintiff obtain his decree without having received notice, the decree will bind the subsequent incumbrancer, as to the accounts, if taken *bonâ fide*, but not his right of redemption (*s*).

II. Except in case of collusion or other fraud, which will give the subsequent incumbrancer a right to open the accounts also, upon his stating particular errors (**1556**); but not to unravel them upon general charges of fraud and collusion, if the fraud and collusion be denied (*t*). And the fraudulent or vexatious conduct of the mortgagor, if he should create subsequent incumbrances with the view of shielding himself from foreclosure, will excuse the mortgagee from making the owners of such securities parties to the suit (*u*).

1033. But where creditors interested under a bond made to a trustee for the creditors, and upon which judgment had been entered up, sued the trustee for an account under the deed, and at the same time prayed for leave to redeem a mortgage prior, and to postpone one subsequent to the judgment (*x*), the bill was dismissed with costs against the subsequent mortgagee as an unnecessary party, the judgment having a legal priority. Considering the subsequent decisions,

(*r*) Bryan *v.* Wastell, Kay, App. xlvii.

(*s*) Cockes *v.* Sherman, Freem. Ch. 14; and semble in Lomax *v.* Hide, 2 Vern. 185; and Godfrey *v.* Chadwell, 2 Vern. 601. But Morret *v.* Westerne, id. 663, seems contra as to accounts. In Greswold *v.* Marsham, 2 Ch. Ca. 170, a judgment creditor was held to be bound, because he had not given notice of his incumbrance.

(*t*) Needler *v.* Deeble, 1 Ch. Ca. 299; Cockes *v.* Sherman, 2 Freem. 14.

(*u*) Yates *v.* Hambly, 2 Atk. 237; and see Smith *v.* Chichester, 2 Dru. & War. 404.

(*x*) Shepherd *v.* Gwinnet, 3 Sw. 151, n. (1791).

and the right of the first mortgagee to have the accounts taken against him once for all, it is not probable that this case would now be followed. It seems that postponement only was the object of joining the subsequent mortgagee, but the principle to be attended to is, that the suit made it necessary for the first mortgagee to account.

1034. It is not enough to serve subsequent incumbrancers with a copy of the bill under the Cons. Ord. X. r. 11 (*y*). The reason for making them parties shows that direct relief is prayed against them, and if such a service had the effect of making them parties, the cause could not be heard, for they would neither have answered nor be in contempt for not doing so. They may, however, come in and submit to the decree; and that they may do so notice of it has been ordered to be given to them (*z*). An equitable mortgagee, who applies for the common order for sale in bankruptcy, must serve all the incumbrancers with the petition (*a*) (**979**).

1035. The mortgagor's trustee to bar dower has an interest which makes him a proper party to a foreclosure suit (*b*); his estate being vested, notwithstanding the existence of a power of appointment overriding the uses (*c*) (**1059**).

Of the Devisee and Heir of the Mortgagor.

1036. The devisee, whether in trust (*d*) or beneficially, of the mortgagor is a necessary party in respect of so much of the equity of redemption as has been devised to him; and the heir (*e*), in respect of what he takes by descent. But if the whole equity be devised, the heir having no interest is not a proper party, either to a bill by the devisee to redeem (*f*) or by the mortgagee to foreclose (*g*). Nor should he be made a

(*y*) Adams *v.* Paynter, 1 Coll. 532; Burgess *v.* Sturges, 14 Beav. 440.

(*z*) Knight *v.* Pocock, 24 Beav. 436.

(*a*) Ex parte Burt, 1 M., D. & De G. 191.

(*b*) Horrocks *v.* Ledsam, 2 Coll. 208.

(*c*) Fearne's Cont. Rem. 226.

(*d*) Coles *v.* Forrest, 10 Beav. 552.

(*e*) Farmer *v.* Curtis, 2 Sim. 466; Fell *v.* Brown, 2 Bro. C. C. 276. And the heir of the mortgagor must join with the mortgagee in conveying the estate to a purchaser in completion of the mortgagor's contract, although the mortgagee is able to convey the legal estate. (Daly *v.* Nalder, 11 Jur., N. S. 921.)

(*f*) Lewis *v.* Nangle, 2 Ves. 430.

(*g*) 2 Ch. Ca. 32.

party to a suit by a devisee of the grantor, in a fraudulent conveyance to set it aside (*h*), because the equity of setting aside such a deed will pass by devise. But it may happen that both should be parties. As if one, claiming to be devisee of a mortgaged estate, seek as well to establish the will (*i*) as to redeem; or if his title as devisee be doubtful (*k*); then the interest of the heir in disputing the will makes him a necessary party.

If the heir and devisee, by reason of a doubt arising upon the will, both claim, the devisee alone, it seems, should be plaintiff, and not both of them; but the heir should be a defendant; for their claims are inconsistent. And the allegation of an agreement between them to divide the estate will not alter this; because the existence and legality of such a contract cannot be assumed, and the parties must therefore be treated as if none such were in existence (*l*).

And so if the mortgaged estate be devised subject to a rent charge, and the rent charge descend to the heir, he must be a party with the devisee to the mortgagee's suit for foreclosure (*m*).

1037. To a suit to redeem by persons entitled under a will to a charge upon the equity of redemption, the trustees of the will are proper parties (*n*); because they may have a claim upon the estate. But in a case where the possessor of the legal estate, and all the persons beneficially entitled, were before the court, and the interest of none of the parties to the record required the presence of the heir at law of the surviving trustee, he was held to be so far a formal party, that, the objection for want of parties not having been taken till the hearing (*o*), a decree was made in his absence saving his rights.

1038. And legatees whose legacies are charged by the will of the mortgagor upon the mortgaged estate have an interest

(*h*) Uppington *v.* Bullen, 2 Dru. & War. 184.

(*i*) Lewis *v.* Nangle, 2 Ves. 430.

(*k*) Earl of Macclesfield *v.* Fitton, 1 Vern. 168.

(*l*) Cholmondeley *v.* Clinton, 2 J. & W. 135; but see 15 & 16 Vict. c. 86, s. 49.

(*m*) Calvert, 245.

(*n*) Faulkner *v.* Daniel, 3 Hare, 213.

(*o*) XXIII. Cons. Ord. r. 11.

in the redemption, and are therefore necessary parties (*p*) to a suit in which that right is brought into question.

Of the Personal Representative of the Mortgagor.

1039. The personal representative of the mortgagor is not generally a necessary party to a suit for foreclosure simply, or for redemption of a mortgage in fee, for he is neither interested in the accounts, nor entitled to redeem. And the possibility that the debt may have been paid is not a ground for making him a party to a simple foreclosure suit. It is for the heir to prove any payment by the mortgagor or his executor of which he claims the benefit, and the plaintiff is not bound to meddle with the personal estate, from which his remedy against the equity of redemption is quite distinct. But if it be alleged in a redemption bill that the mortgagee has been in possession and is overpaid, the personal representative of the mortgagor must be joined (*q*).

And so in a suit to enforce an equitable mortgage, it is not proper to bring forward the personal representatives of a deceased tenant for life of the mortgaged estate, merely because the defendants may have a right to reimburse themselves out of his assets, to the amount of arrears of interest accrued during his tenancy (*r*) (**1643**); the plaintiffs not being bound to meddle with any adjustment of accounts between the persons interested in the equity of redemption.

1040. If the executors raise money for payment of debts by way of further charge upon an estate already in mortgage (*s*), the devisee seeking redemption on payment of the original mortgage only, need not make the executors parties in the first instance, if his claim does not recognize their interest, but leaves it to be brought forward in the defence.

1041. The personal representative of the mortgagor is a proper party to a suit in respect of a mortgage of a subsisting

(*p*) Batchelor *v.* Middleton, 6 Hare, 78.

(*q*) Duncombe *v.* Hansley, 3 P. W. 333, n.; Grace *v.* Lord Mountmorris, 2 Dru. & War. 432; Baker *v.* Wetton, 9 Jur. 98.

(*r*) Wynne *v.* Styan, 2 Ph. 305.

(*s*) Greenwood *v.* Rothwell, 7 Beav. 279.

term or other chattel interest (*t*). But he has no right of redemption in a term created out of the inheritance, for the purpose of making it a mortgage security, and his presence is accordingly unnecessary upon foreclosure of such a term (*u*).

Where the representation to the mortgagor's estate is only by administration pendente lite, a decree of foreclosure against the administrator only will not bind the persons beneficially interested (*x*).

1042. If the object of the suit be to obtain a sale either under a mortgage by way of trust (*y*) for sale, or on the bill of an unpaid vendor of real estate (*z*) or otherwise, or if the mortgagee pray for payment of any deficiency out of the personal estate of the mortgagor (*a*), the personal representatives of the latter are necessary parties, because they are interested in the produce of the sale, and in the taking of the accounts.

So where the suit is by the transferee of a mortgage of a lease for lives, and seeks a renewal of the lease, the fine and expenses of which may be chargeable on the estate of the mortgagor under his covenant (*b*).

1043. Also if it appear by the bill that the tenant for life have been in possession of the rents and profits, and have kept down the interest and made payments on account of the principal (*c*), his personal representative is a proper party to the suit as having an interest in seeing that the accounts are properly taken, and a possible right to stand to some extent as a creditor.

1044. And so of the personal representative of a deceased subsequent incumbrancer, as of an annuitant under the will of the mortgagor, whose annuity was in arrear (*d*).

1045. When persons, who claim under the will of the mortgagor charges on the equity of redemption, are entitled to

(*t*) Wilton *v.* Jones, 2 Y. & C. C. C. 244.

(*u*) Bradshaw *v.* Outram, 13 Ves. 234; Bampfield *v.* Vaughan, Rep. t. Finch, 104.

(*x*) Ellis *v.* Deane, Beat. 5.

(*y*) Christophers *v.* Sparke, 2 Jac. & W. 229.

(*z*) Cave *v.* Cork, 2 Y. & C. C. C. 130.

(*a*) Daniel *v.* Skipwith, 2 Bro. C. C. 154.

(*b*) Gregson *v.* Hindley, 7 Jur. 248.

(*c*) Cholmondeley *v.* Clinton, 2 J. & W. 134; Faulkner *v.* Daniel, 3 Hare, 207.

(*d*) Hunt *v.* Fownes, 9 Ves. 70.

have the real estate exonerated out of the personalty (*e*) (1323, 1350), they may require the presence of the testator's personal representatives; but in a case in which the mortgagor had been dead many years before the filing of the bill, and the mortgaged estate long treated as his only available property, an objection on account of the absence of the personal representatives taken for the first time at the hearing was not allowed, but a decree was made saving the rights of the representative (*f*) in his absence.

And so to a suit for sale by the surviving partner of a firm, where a deceased partner and another, being joint owners of an estate, had deposited the title deeds with the firm as a security for a debt, against the surviving owner and the heir of the deceased partner (*g*), the personal representative of the latter was held to be a necessary party to avoid circuity of suit; the personal estate being then liable for the debt in exoneration of the descended realty.

1046. If the equity of redemption have been dealt with by the mortgagor in his lifetime, so as to be converted into personalty, his personal and not his real representative will be the proper plaintiff in a redemption suit (*h*); and if the bill be brought by the heir, it seems that the defect will be incurable; it cannot be remedied by making the executor a co-plaintiff, for then there would be plaintiffs with conflicting interests (*i*); nor by making him a disclaiming defendant, because his disclaimer, after the filing of the bill, will not sustain the suit of a plaintiff who had no interest at that time.

1047. Where a person died, having created an equitable mortgage, with an agreement to execute a legal mortgage, and his administratrix renewed the lease, and gave the original mortgagee a legal security with a power of sale, she was held (*k*) a necessary party in a suit to compel specific performance of a contract for sale under the power.

(*e*) Faulkner *v.* Daniel, 3 Hare, 213; see 17 & 18 Vict. c. 113.

(*f*) Cons. Ord. XXIII. r. 11.

(*g*) Scholefield *v.* Heafield, 7 Sim. 667; but see 17 & 18 Vict. c. 113.

(*h*) Griffiths *v.* Ricketts, 7 Hare, 305.

(*i*) But the court can now give relief, notwithstanding a conflict of interests in co-plaintiffs; 15 & 16 Vict. c. 86, s. 49.

(*k*) Sanders *v.* Richards, 2 Coll. 568.

1048. An administrator acting under letters of administration, limited to substantiate proceedings in the suit, and granted by the proper court, sufficiently represents the intestate (*l*) if the purposes of the suit do not require a general or more extensive representation (*m*).

1049. If the heir or person claiming under the mortgagor an interest in the equity of redemption be out of the jurisdiction, or his residence or existence be unknown, the cause must stand over until the defect arising from the want of parties can be remedied (*n*), unless the suit be of such a kind that the plaintiff can in his absence have proper and sufficient relief. As where the heir of the mortgagor of a term of years being absent, the owner of the legal interest of the first mortgagee of the term, who had also contracted to purchase the equity of redemption, was declared to be a trustee of the legal interest for the second mortgagee (*o*). And a decree may be made against the trustees and some of the devisees of the proceeds of the sale of the mortgaged estate where the others are out of the jurisdiction (*p*).

If no heir can be found, the Attorney-General should be made a party (*q*), and his absence cannot be remedied by his appearance by counsel at the hearing (*r*). The Court will not direct an inquiry (under Cons. Ord. XX.) in a foreclosure suit as to who is the heir at law of the owner of the equity of redemption; the object of the order being to facilitate the hearing as against the parties to the suit, and not to strike them off the record (*s*).

Of the Persons claiming Interests in the Security and Debt.

Of the Mortgagee.

1050. No bill can properly be filed against the mortgagee, nor can he properly be made a party to a suit in respect of

(*l*) Faulkner *v.* Daniel, 3 Hare, 208; Davis *v.* Chanter, 2 Ph. 545.

(*m*) As in Clough *v.* Dixon, 10 Sim. 564; Groves *v.* Lane, 16 Jur. 854.

(*n*) Fell *v.* Brown, 2 Bro. C. C. 276; Anderson *v.* Stather, 2 Coll. 209; Farmer *v.* Curtis, 2 Sim. 466.

(*o*) Howes *v.* Wadham, Ridg. Ca. temp. Hard. 201.

(*p*) Runcorn *v.* Nicholson, 5 L. J. (Ch.) N. S. 203.

(*q*) Leahy *v.* Dancer, 3 Mol. 108.

(*r*) Catley *v.* Simpson, 10 Jur., N. S. 993.

(*s*) Warner *v.* Moore, 10 L. J. (Ch.) N. S. 371.

the mortgaged estate, unless there be an offer to redeem him, made by a person entitled to do so. And if there be no such offer the mortgagee may demur (*t*) (469).

Therefore one who has agreed to purchase an equity of redemption, having no right to redeem until the completion of the purchase (for he who claims a right to redeem must first have acquired the mortgagor's title to a re-conveyance (*u*)), cannot make the mortgagee, either of a legal (*x*) or equitable (*y*) interest, a party to a suit to compel specific performance of a contract in which he has no concern, or the performance of which will not affect his security or interfere with his remedies. And on a bill (*z*) by an alleged lessee against the lessor for discovery of the lease (which the defendant pleaded was invalid), and containing a prayer, that the lessor might redeem a mortgage made by him, the mortgagee of this mortgage was held, on demurrer, not to be a necessary party; probably, because the plaintiff's right to meddle with him depended upon the very question at issue in the suit, viz. the validity of the lease.

But if the mortgagor's title be impeached by the bill, the mortgagee, having a great interest in supporting it, and being often in possession of the deeds, ought to be joined (*a*).

1051. If the mortgagee admit his interest, he may be joined, without any offer to redeem, in a suit to carry out the trusts of a deed to which he was not a party, and by means of which it is intended to exonerate the mortgaged estate from the debt by payment thereof out of other estates (*b*). If, however, he claims no interest in such a suit, he must be careful to disclaim, and not to demur thereto, where the bill contains not merely a general allegation that the defendant is interested (which is not enough to prevent a demurrer) (*c*), but an express denial that he has any interest in the estates, followed by an allegation that he claims an interest the nature

(*t*) Tasker *v.* Small, 3 Myl. & Cr. 63; Dalton *v.* Hayter, 7 Beav. 319; Inman *v.* Wearing, 3 De G. & S. 729.

(*u*) Franklyn *v.* Fern, Barn. Ch. 30—32; Bickley *v.* Dorrington, and Monk *v.* Pomfret, cited there.

(*x*) Tasker *v.* Small, supra.

(*y*) Hall *v.* Laver, 3 Y. & C. 191.

(*z*) Hitchins *v.* Lander, Coop. Rep. 34.

(*a*) Copis *v.* Middleton, 2 Mad. 423.

(*b*) Dalton *v.* Hayter, 7 Beav. 313.

(*c*) Plumbe *v.* Plumbe, 4 Y. & C. 345.

of which he ought to set forth; for by demurring he would admit the charge that he claims an interest, which makes his presence necessary.

1052. Where a mortgagee has assigned the whole benefit of his security, having previously been in possession, and the mortgagor seeks an account of an overplus alleged to have been received, the mortgagee, notwithstanding his assignment, must be joined with the assignee, that he may account for what he received in his time (*d*). But if the mortgagor seek only an account of what is due to the assignee, for the purpose of redemption, then, and it seems whether the mortgagor have or have not been a party to or had notice of the assignment, the mortgagee who has assigned need not be a party (*e*). In the latter case (*f*), because the assignee, having agreed to stand in the place of the original mortgagee, is bound by all the equities subsisting between him and the mortgagor, and cannot afterwards object to accounts which he has already taken on the credit of the assignor; and it seems upon principle in the former also, because the assignor's accounts have been admitted by both parties (*g*).

(*d*) Anon., 2 Eq. Ca. Abr. 594, Duchy; Freem. Ch. Rep. Ca. 66. Said in Powell, 953, note (*m*), to be overruled by Chambers *v.* Goldwin, 9 Ves. 269. But Lord Eldon's observations did not extend to the case put here, of a mortgagee in possession, and an account sought of the overplus received. Upon the principle of the case cited, was decided Lowther *v.* Carlton, in which, according to the report in 2 Atk. 139, it was held, that if there have been several transfers of a mortgaged estate, a *puisné* assignee who had notice of the mortgage may call for the presence of the *mesne* assignee, who had no notice, or of his representatives, that he may avail himself of the shelter afforded by the title of the other. The case thus put is doubted by Mr. Calvert, and in fact bears internal evidence of error; for it is stated that the very representatives were parties in respect of whose absence the objection was taken. The report in Barn. Ch. 358, shows, that although the question of notice really arose, the representatives were ordered to be joined, on the ground that they had been in possession, and that an account was sought of *mesne* profits. The case is also reported, but not on the question of parties, in Ca. t. Talb. 187.

(*e*) Freem. Ch. Rep. Ca. 66.

(*f*) Hill *v.* Adams, 2 Atk. 39; Norrish *v.* Marshall, 5 Mad. 475; Chambers *v.* Goldwin, 9 Ves. 269.

(*g*) Freeman's Ch. Rep. Ca. 66, n.; Car *v.* Boulter, id. Ca. 290. In the case of Barker *v.* Kellet, Freem. Ch. Rep. Ca. 146, it is said, that to a redemption bill by the heir of the mortgagor against the assignee of the mortgage, seeking also discovery of what had been paid on the assignment, a demurrer to the discovery, and because the assignor was

If only part of the security have been assigned to a derivative mortgagee, for a less sum than the original debt, then upon a suit for redemption or foreclosure, the original mortgagee must be a party; for he claims an interest, viz. a right to redeem the assignee, and prevent another account (*h*). Yet if in such a case the objection of the absence of the original mortgagee be not taken until the hearing, the cause will be suffered to proceed without him, if, being a witness, he have sworn that he is fully satisfied and retains no interest (*i*).

1053. Where there are several tenants in common or joint tenants of the mortgage money, all must be parties (*k*).

1054. The second or other *puisné* incumbrancers may foreclose those subsequent, without joining those prior to themselves (*l*); for the latter can suffer no damage. The subsequent mortgagees, it is true, are left without the opportunity of redeeming all who are prior to themselves in the same suit; which, however inconvenient, is not thought to be unjust towards those who, lending money upon incumbered estates, have a full knowledge of the state of the security.

1055. Nor are the owners of prior incumbrances necessary parties to suits for sale (*m*) of the estate by subsequent creditors, the sale being made subject to those incumbrances. And a judgment creditor may file his bill against a receiver and owner of estates (*n*), for satisfaction out of surplus rents by a former decree directed to be paid to the owner, without making prior incumbrancers parties.

not a party, was allowed; for that he should not discover what he paid, and that if plaintiff would redeem he should pay what was due on the original mortgage. The reason does not justify the demurrer for want of parties, for the assignor's presence could not be required by the assignee, if the price of redemption was to be the original debt, the assignee being clearly bound as to that. It seems that demurrers were formerly allowed in part. See Lord Red. 214. In an Irish case, in which the mortgagor was only a witness to the assignment, it was said that there ought to be a charge that he knew and agreed to its contents. (Jamieson *v.* English, 2 Mol. 337.)

(*h*) Norrish *v.* Marshall, 5 Mad. 475; Hobart *v.* Abbot, 2 P. Wms. 642.

(*i*) Norrish *v.* Marshall, supra.

(*k*) Vickers *v.* Cowell, 1 Beav. 529.

(*l*) Rose *v.* Page, 2 Sim. 471; Richards *v.* Cooper, 5 Beav. 304; and see 3 Hare, 38.

(*m*) Delabere *v.* Norwood, 3 Sw. 144, n.; Parker *v.* Fuller, 1 R. & M. 656.

(*n*) Lewis *v.* Lord Zouche, 2 Sim. 388.

It seems, however, that subsequent mortgagees, suing for an account and declaration of priority in their favour, have a right to the presence of a prior mortgagee, if the rights of the parties cannot be settled in his absence, though if the objection be not taken till the hearing, a decree will be made saving his rights under XXIII. Cons. Ord. s. 11 (*o*).

1056. And an exception, the consequence of the nature of the relief, may arise where a mortgagee can be redeemed as to part only of his security, which, it has been held, may be done by a remainderman, as against the second mortgagee of a charge on the estate, made by a former tenant for life under a power, and by him mortgaged with other property, on payment of so much only of the amount of the charge as, the amount of the principal of the first mortgage being deducted, was comprised in the second mortgagee's security. In such a case it was held (*p*), that the prior mortgagee of the charge, as well as the personal representatives of the mortgagor, must be parties; the former as being interested in the amount comprised in the second mortgagee's security, and the latter in ascertaining whether the mortgagor had paid off any and what part of the charge in his lifetime.

1057. If a receiver be prayed of the general proceeds of the estate, this being an interference with the interests of prior incumbrancers, will make their presence necessary (*q*). And the prior incumbrancers must be parties, if they have joined with the mortgagor in appointing a receiver, who covenants to keep down the incumbrances, and to pay the surplus to the mortgagor, to a suit against the receiver by subsequent incumbrancers, for an account and injunction against payment of the surplus to the mortgagor; because the receiver is agent for, and stands in a fiduciary relation to, all the incumbrancers (*r*).

(*o*) Feltham *v.* Clark, 1 De G. & S. 307.

(*p*) Lord Kensington *v.* Bouverie, 16 Beav. 194; 19 id. 39.

(*q*) Gibbon *v.* Strathmore, V.-C. E., cited Calvert, 16.

(*r*) Ford *v.* Rackham, 17 Beav. 485.

Of the Assignees and Devisees of the Security and Debt.

1058. The person in whom the legal interest in the security becomes vested, whether it be by the original mortgage (*s*), by assignment (*t*), or by devise (*u*), and though he be only a trustee (*x*) for the persons entitled to the mortgage money, is a necessary party to a suit for redemption (*y*), or foreclosure (*z*). To the one that a reconveyance may be obtained, to the other for the same reason if the defendant should redeem, and in case of a decree for foreclosure, because the legal interest is to be protected by the decree (**1810**).

And if the mortgagee have made an absolute conveyance with several limitations and remainders over, especially where the title to redemption depends upon equitable circumstances (as if the mortgage be of long standing (*a*)), the first tenants in tail at least must be brought before the court.

The purchaser from a mortgagee under his power of sale is not a necessary party to a bill by the mortgagor against the mortgagee to recover the surplus purchase-money, and offering to confirm the sale (*b*).

1059. The rule also applies to trustees for the mortgagee in respect of their power to give discharges for the mortgage debt; and it renders necessary the presence of a trustee, who, having signified his resignation only by a memorandum endorsed on the trust deed, has not been fully discharged from the trust by the appointment of a successor (*c*).

The trustee of the legal interest in the security having no adverse rights may properly be, and to save expense to the mortgagor ought (*d*) to be, a co-plaintiff; though it has been thought a sufficient reason (*e*) for making him a defendant, that he *might have refused* to be a plaintiff.

(*s*) Wood *v.* Williams, 4 Mad. 186.

(*t*) Wetherell *v.* Collins, 3 Mad. 255.

(*u*) Wood *v.* Williams, supra; Wetherell *v.* Collins, supra; Hichens *v.* Kelly, 2 Sm. & G. 264.

(*x*) Osbourn *v.* Fallows, 1 Russ. & M. 741.

(*y*) Wetherell *v.* Collins, supra.

(*z*) Bartle *v.* Wilkin, 8 Sim. 238; Smith *v.* Chichester, 2 Dru. & War. 404.

(*a*) Yates *v.* Hambly, 2 Atk. 237.

(*b*) Minn *v.* Stant, 15 Beav. 49.

(*c*) Adams *v.* Paynter, 1 Coll. 530.

(*d*) Smith *v.* Chichester, 2 Dru. & War. 404.

(*e*) Browne *v.* Lockhart, 10 Sim. 426.

1060. Persons with whom the mortgagee has dealt wrongfully for the produce of the mortgaged estate are proper parties to a redemption suit, as being in possession of the value of the converted part of the estate, though they no longer hold the property *in specie* (*f*).

Of the Heir of the Mortgagee.

1061. If the legal interest should descend, the heir of the mortgagee must be a party; and if the suit be for foreclosure, the mortgagee's executor, upon reviving, must join the heir. And this is by the same reason which makes a trustee of the legal interest a necessary party; for the heir is a trustee for the executor (*g*).

The rule, however, of course does not extend, as the reason does not apply, to an heir who has not the legal interest: so that the heir of a subsequent mortgagee need not be joined in a foreclosure suit by the prior mortgagee (*h*). But to a suit by the transferee of a mortgage of leaseholds for lives to compel a renewal, the heir of the original mortgagee was held to be a necessary party, because the new lease would not be granted without his consent (*i*).

If the legal interest have been devised by the mortgagee, the heir is not a necessary party (*k*).

Where the heir at law could not be found the suit stood over (*l*), that the Attorney-General might be made a party to represent the legal interest (**1049**).

Of the Personal Representative of the Mortgagee.

1062. The mortgage debt being part of the mortgagee's personal estate, the security belongs, in equity, to his personal

(*f*) Hood *v.* Easton, 2 Jur., N. S. 729; see id. 917.

(*g*) Scott *v.* Nicol, 3 Russ. 476.

(*h*) Whitla *v.* Halliday, 4 Dru. & War. 267.

(*i*) Gregson *v.* Hindley, 7 Jur. 248.

(*k*) How *v.* Vigures, 1 Rep. in Ch. 32. In Skipp *v.* Wyatt, 1 Cox, 353, the heir was made a party by the devisee to establish the will against him, and the plaintiff was ordered to pay the heir's costs, which it was said should not be thrown on the estate, because they arose from the mortgagee's act in disposing of the property. As a general rule, however, it is clear that the estate is liable to costs arising out of the lawful and reasonable dispositions of the mortgagee (**1731**).

(*l*) Smith *v.* Bicknell, 3 Ves. & B. 53, *n.*; and see Casberd *v.* A.-G., 6 Price, 411.

representatives; for whom, upon the death of the mortgagee after forfeiture, the heir, though in by descent, is only a trustee (*m*). Having, therefore, a right to receive the money upon redemption and to hold the estate upon foreclosure (*n*), their presence becomes necessary in suits of both kinds. But with this exception, that in a suit to redeem a Welsh mortgage of long standing, the court *excuses* (*o*) their absence, leaving the parties to controvert the matter between themselves. And this practice is evideutly not from any want of interest in the personal representatives, but out of indulgence to the plaintiff, who might otherwise, after many years, find redemption impossible (**12, 498**).

If tenants in common be entitled to the mortgage-money the personal representatives of those who die must be joined (*p*). It is the same, though the persons entitled are in fact jointly interested as trustees, if there be nothing in the deed to show that the representatives of the deceased mortgagee are not entitled (for which the fact that the debt appears by the deed to be trust money is not sufficient) (*q*); because the right to money advanced by several persons jointly does not survive in equity.

So the personal representatives of the original mortgagee must be parties to the suit of his submortgagee to foreclose the original mortgagor (*r*), in respect of their right to redeem the submortgagee.

And the personal representative of an unpaid vendor of real estate (*s*) is a necessary party to a suit by the trustees of his personal estate for foreclosure; and if one of the trustees, being also the sole executor, die, the suit will abate as if he had been executor only, and not trustee; consequently his executors also must be made parties.

Although the absence of the mortgagee's personal representative do not appear till the hearing, the suit will not be

(*m*) Ellis *v.* Guavas, 2 Ch. Ca. 50; Wynn *v.* Littleton, id. 51.

(*n*) Freak *v.* Hearsey, 1 Ch. Ca. 51.

(*o*) Per Lord Hardwicke, Longuet *v.* Scawen, 1 Ves. 406.

(*p*) Vickers *v.* Cowell, 1 Beav. 529.

(*q*) Id.

(*r*) Hobart *v.* Abbott, 2 P. Wms. 642.

(*s*) Cave *v.* Cork, 2 Y. & C. C. C. 130.

permitted to proceed without him (*t*). And, where in his absence the heir of the mortgagee obtained a decree for foreclosure, the estate was decreed (*u*) to the personal representative upon his filing a bill for that purpose; though it was said by Lord Chancellor Jefferies (*x*), that in such a case the heir might well say to the executor or administrator,—"I will pay you the money and take the benefit of the foreclosure to myself," in case the land were worth more than the money.

Of the Persons beneficially interested, either in the Equity of Redemption or in the Security and Debt.

1063. In all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, it is enacted that such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and, in such cases, it is not necessary to make the persons beneficially interested under the trusts parties to the suit, but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties (*y*). Before the passing of this statute, and the date of an order of court, which directed (*z*) that devisees in trust of real estates, having power to sell and give discharges for purchase-monies, rents and profits, should represent the *cestuis que trust* to the same extent as they are represented by executors or administrators in suits concerning personalty, it was a general rule, that all persons beneficially interested in the equity of redemption or in the mortgage money should be made parties to suits affecting their interests.

The extent to which the interests of *cestuis que trust* may be represented by executors and administrators in suits concerning personalty is, therefore, subject to the discretion of the court, declared by the statute to be the standard by which the

(*t*) Meeker *v.* Tanton, 2 Ch. Ca. 29.
(*u*) Gobe *v.* Carlisle, cited 2 Vern. 67.
(*x*) Clerkson *v.* Bowyer, 2 Vern. 67.
(*y*) 15 & 16 Vict. c. 86, s. 42, rule 9.
(*z*) 20th Order, August, 1841.

representative powers of trustees of real or personal estate, however the trust may have been created, is to be measured; and with regard to the subject of mortgages, it will be remembered that the executor or administrator is the proper person to sue (**559**) and be sued (**1041**) in respect of securities on chattel interests, without the persons beneficially entitled (*a*).

1064. The effect of the statutory rule upon suits between mortgagor and mortgagee, relating to securities upon real estate, appears to be, that the *cestuis que trust* will be well represented by the trustees, where the latter have complete power over the estate, or have under their control funds applicable to the purpose of redemption: and the individual rights of redemption, which before the statute belonged to such *cestuis que trust*, will, to the extent to which they are so represented, be taken away.

Thus, in a suit for foreclosure (*b*) against the absolute devisees of the equity of redemption in one moiety of the estate, and against the devisees in trust of the other moiety, being also the executors of the mortgagor, the *cestuis que trust* of the second moiety were held not to be necessary parties; because all the persons, who had control over the property out of which the debt was to be paid, were present.

And on the same principle a decree may be made for sale of a mortgaged estate in the absence of the *cestuis que trust* of the equity of redemption, where the devisees in trust are also executors of the mortgagor (*c*).

The right of redemption of the *cestuis que trust* of a *puisné* mortgage (*d*) will in like manner be bound if the trustees being themselves mortgagees, or taking the mortgage as executors, be alone made parties to the suit.

If, however, the devisees in trust of the estate be not executors of the mortgagor, it seems that the old rule will remain in force (*e*).

(*a*) Wilton *v.* Jones, 2 Y. & C. C. C. 244.

(*b*) Sale *v.* Kitson, 17 Jur. 171; 3 De G., M. & G. 119.

(*c*) Hanman *v.* Riley, 9 Hare, App. xl.; Marriott *v.* Kirkham, 3 Gif. 536.

(*d*) Goldsmid *v.* Stonehewer, 9 Hare, App. xxxix; 17 Jur. 199.

(*e*) See Coles *v.* Forrest, 10 Beav. 557.

1065. And it is to be observed, that there is a distinction between cases arising under wills and those under settlements, viz. that in the latter the trustees of the persons entitled to redeem have not generally the control over any other than the settlement fund, and may therefore be without the means of redeeming; in such cases the court will not permit adult *cestuis que trust* to be foreclosed (*f*), without an opportunity of redeeming, but will require (*g*) either that they be made parties, or that an affidavit be produced to the effect that they have had notice of the proceedings, and do not object to the proposed decree. The same principle applies to the case of a will where, the surviving trustees of the will having disclaimed, the mortgagor's estate is represented only by an infant heir (*h*). And where the equity of redemption is settled in trust for the mortgagor for life, with remainder to his children, and the children of such as should die, it seems that the mortgagor's infant grandchildren, whose parents are dead, as well as the representative of a deceased child, who has been a defendant, ought to be joined in a foreclosure suit (*i*). But if, instead of the usual decree in such a suit, a sale be directed, and the money be ordered into court (such proceeding being shown to be beneficial to the infant), the presence of these parties will be unnecessary (*k*).

The distinction above referred to appears to take out of the operation of the statute, as regards adult *cestuis que trust*, all cases arising under wills, where the devisees in trust, not being also executors, have no fund applicable to the purposes of redemption (*l*).

(*f*) Goldsmid *v.* Stonehewer, supra. So the case of Calverley *v.* Phelp, 6 Mad. 229, before the act, though there was a power for the parties to give receipts, which it was held only made the concurrence of the *cestuis que trust* unnecessary in case of a sale.

(*g*) Tuder *v.* Morris, 1 Sm. & Gif. 503.

(*h*) Young *v.* Ward, 10 Hare, lix.

(*i*) Siffken *v.* Davis, Kay, xxi. The observations of Wood, V.-C., only referred directly to the representative of the deceased defendant; but his allusion to the rule in Goldsmid *v.* Stonehewer seems to involve the point respecting the infants, which was also debated.

(*k*) Siffken *v.* Davis, supra.

(*l*) This position seems to be supported by a decision of Stuart, V.-C., in which he refused to allow a devisee of an equity of redemption of freehold to represent the persons beneficially interested: Cropper *v.* Mellersh, 1 Jur., N.S.

And even in the case of a settlement, if the *cestuis que trust* be infants, or if their shares have been again settled, inasmuch as the infants and the trustees of the sub-settlements cannot be expected to be in a position to redeem, they will be well represented by the trustees of the original settlement. And so will the *cestuis que trust* under a creditor's deed, by the terms of which the trustees have no power over the mortgaged estate (*m*).

Where amongst the subsequent incumbrances on an estate, the subject of a foreclosure suit by the first mortgagee, there were eight mortgages made on the same day, in respect whereof only one right of redemption was given (1786), and one of the eight mortgagees died, to whose estate there was a difficulty in getting representation, the suit was ordered to proceed without a representative (*n*).

Where the mortgagor sues for redemption, and there is but a single mortgage which has passed by the will of, or by assignment from, the mortgagee, the *cestuis que trust* under the will or settlement will probably be no longer necessary parties with their trustees (*o*).

1066. Where one of several *cestuis que trust* of mortgage money sues for foreclosure, the others must also be made parties, a practice which is founded upon the principle, that for preventing a multiplicity of suits there shall be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the court (*p*). A later case, in which one of several persons entitled to distinct shares of money laid out by trustees in a single sum, having sued for an account, and foreclosure of a proportion of the security, with-

299. But see Wilkins *v.* Reeves, 24 L. J. 337. The following cases, decided before the statute, appear to come within the distinction: Anderson *v.* Stather, 2 Coll. 209; Wilton *v.* Jones, 2 Y. & C. C. C. 244; Coles *v.* Forrest, 10 Beav. 557; Drew *v.* Harman, 5 Price, 319; Whistler *v.* Webb, Bunb. 53; Henley *v.* Stone, 3 Beav. 355.

(*m*) Goldsmid *v.* Stonehewer, 9 Hare, App. xxxix; Morley *v.* Morley, 25 Beav. 253.

(*n*) Long *v.* Storie, 23 L. J. (Ch.) N. S. 200. According to the report in Kay (App. xiii), a creditor was appointed representative for the purpose of the suit.

(*o*) See Wetherell *v.* Collins, 3 Mad. 255; Osbourn *v.* Fallows, 1 Russ. & M. 741.

(*p*) Lowe *v.* Morgan, 1 Bro. C. C. 368.

out joining the other persons entitled, a decree was made according to the prayer (*q*), has caused some perplexity; and the cases have been thought to be distinguishable (*r*) by the circumstance that in the case of *Lowe* v. *Morgan*, the *cestuis que trust* were joint tenants of the money laid out in their trustees' names, but in the case of *Montgomerie* v. *Bath*, the mortgagees were tenants in severalty or in common; and it has been concluded, that one joint tenant of money so laid out cannot foreclose without the concurrence of the other joint tenants, but that a tenant in severalty or in common, having money on the same mortgage and in the name of the same trustee as another person, may foreclose without making that other person a party.

But this distinction strikes at the design of the practice to avoid a multiplicity of suits; to which the borrower of money belonging to tenants in common must be exposed, if any one of them can sue him alone. The learned editor of Mr. Powell's work attempts to avoid this objection by the argument that there is a difference between splitting one mortgage into different sums belonging to several persons, and the case where several persons lend distinct sums on the same security; for, in the latter case, the mortgagor knows at the time of borrowing the money how many suits can be brought against him. But it does not appear by the report of *Montgomerie* v. *Bath*, that the mortgagor knew in what right the money belonged to the lenders. On the contrary, the security was made, and the debt was made payable to the trustees alone, and the trust was declared by a subsequent deed poll; and it is submitted with deference, that whether the money be a single sum advanced by joint tenants in the name of the trustee, or composed of distinct sums to which different persons are entitled in severalty (*s*), it is equally the practice not to disclose the trust on the face of the mortgage, but to make the trustee alone the mortgagee, and the person entitled to receive the money. The fact is, that the decision in question, although the *Reg. Lib.* is said not to show (*t*) that it was

(*q*) Montgomerie *v.* Bath, 3 Ves. 560.
(*r*) Powell, Mort. 964, n. (*c*).
(*s*) See Jones *v.* Pugh, 12 Sim. 470; 1 Ph. 96.
(*t*) 1 Sim. & S. 425.

made by consent, is distinctly stated by the reporter to have been made without opposition at the hearing; and there will, consequently, be little difficulty in following Mr. Belt's opinion (*u*) of its incorrectness; especially as the doctrine of *Lowe* v. *Morgan* has been since judicially confirmed (*x*).

1067. The presence of the persons beneficially interested under a will is not necessary in a suit by the executor and trustee to recover money lent by him on mortgage, under a power of investment contained in the will, even though the will contain no power to give discharges for the mortgage monies; because that power is implied by the nature of the trust (*y*).

1068. The court will not permit the representatives of a deceased trustee of a mortgage, or even the surviving trustees (at least where the original number has been much reduced), to redeem without the presence of some of the *cestuis que trust;* lest the trustees should misapply the mortgage money. But the mortgagee would be safe upon such a redemption without the *cestuis que trust* (*z*).

1069. If several of a body of trustees, where the *cestuis que trust* are numerous and fluctuating, file a bill against the remainder of the trustees, and a purchaser claiming an absolute title under a power of sale in a mortgage, offering to confirm the sale, but claiming the benefit of it as against the mortgagee (*a*), so many at least of the *cestuis que trust* for the time being, as have not consented to the suit, ought, under the practice hitherto pursued, to be made parties, their interests being inconsistent with those of the rest. But part of the consenting *cestuis que trust* might, under the sanction of a majority of the whole body, represent the rest of the consenting parties, where the majority had a right to give a sanction to the transaction in question. It does not seem likely that, in such cases, the presence of any less number of the *cestuis que trust* would be sufficient under the present law.

(*u*) 1 Bro. C. C. 368, Mr. Belt's note.

(*x*) Palmer *v.* Earl of Carlisle, 1 Sim. & S. 423.

(*y*) Wood *v.* Harman, 5 Mad. 368; and see Locke *v.* Lomas, 5 De G. & S. 326; 16 Jur. 814. See 23 & 24 Vict. c. 145, s. 29.

(*z*) Stansfield *v.* Hobson, 15 Beav. 189.

(*a*) See Minn *v.* Stant, 12 Beav. 190; 15 Id. 49.

1070. Before the passing of the statute now under consideration, it was necessary to join scheduled creditors under a deed of assignment for the benefit of creditors where they have executed the deed (*b*); but where the trustees have no interest distinct from such creditors, nor any duty but to get in and distribute the property, it is probable that the presence of the creditors will not now be required; for it seems, that such creditors have not in themselves any right of redemption apart from the trustees (*c*). Where, besides redemption, the bill seeks a declaration as to the priorities of the plaintiff, and the other incumbrancers (*d*), it is not easy to see how scheduled creditors (the doubt as to the amount of whose interests implies a contest between each of them and every other claimant on the estate), can be adequately represented by the trustees.

A small number of scheduled creditors may, however, represent the rest (*e*) in the suit, if the bill show a good reason for omitting the entire body, and show also that a proper choice has been made. It seems essential to such a choice, that no representing creditor should have any interest in the matter, conflicting with the interests of those whom he represents; as, for instance, an interest in the equity of redemption, in addition to his right as a creditor under the deed of trust.

Scheduled creditors, who are not parties to the deed of trust, need not be parties to the suit (*f*).

1071. *Cestuis que trust*, who have neither been parties nor privies to a mortgage security, by which the fund was invested in breach of trust, and who have not adopted the transaction, are not necessary parties to a foreclosure suit by the trustees (*g*). If, in such a case, the *cestuis que trust* have

(*b*) Newton *v.* Earl of Egmont, 4 Sim. 574; 5 Id. 130; Thomas *v.* Dunning, 5 De G. & S. 618.

(*c*) Troughton *v.* Binkes, 6 Ves. 573.

(*d*) Newton *v.* Earl of Egmont, supra.

(*e*) Holland *v.* Baker, 3 Hare, 68.

(*f*) Powell *v.* Wright, 7 Beav. 444. See also as to joining scheduled creditors, Gore *v.* Harris, 15 Jur. 761; and see Smart *v.* Bradstock, 7 Beav. 500; Doody *v.* Higgins, 9 Hare, xxxii; Walwyn *v.* Coutts, 3 Mer. 707; Garrard *v.* Lord Lauderdale, 3 Sim. 1; 2 Russ. & M. 451; Law *v.* Bagwell, 4 Dru. & W. 406.

(*g*) Allen *v.* Knight, 5 Hare, 280.

adopted the transaction, it seems that they should be co-plaintiffs if made parties to the suit, which, however, would probably be now unnecessary (*h*).

1072. The equitable tenant in tail (*i*) was and will probably still be a necessary party with the trustees of the legal estate, who have power to sell and give discharges for the purchase-money, where the object of the bill is to sell the settled estate. He is not a person whom it will be sufficient to serve with a copy of the bill upon the ground of no direct relief being sought against him under Cons. Ord. X. r. 11.

1073. The persons beneficially interested under a will are not necessary parties (*k*) to a suit, by an executor against his co-executor to realize a mortgage debt due from the latter to his testator. And it seems (*l*), that *cestuis que trust* under a will may be represented by the personal representative, in a suit by an equitable mortgagee of the testator, to whom the representative has given a legal mortgage and power of sale, to enforce specific performance of a sale under the power.

1074. A person who claims to be interested in part of a debt, secured by a mortgage to another person, is sufficiently represented by the latter in a suit to set aside the security, and ought not to be made a party to it (*m*).

1075. If the trustee in whose name money is lent on mortgage be a solicitor, it being an ordinary part of his duty to lay out money for his clients, he is not bound (*n*) to discover the names of his *cestuis que trust*, if he cannot do it without a breach of professional confidence, notwithstanding any inconvenience which may arise to the plaintiff from want of the information. For the liability to make the discovery may ruin the business of the solicitor; and the debtor would have an unfair hold upon his creditor, if the latter should happen to be a person who had forfeited his legal rights.

(*h*) Allen *v.* Knight, supra.

(*i*) Berkley *v.* Lord Reay, 2 Hare, 306.

(*k*) Peake *v.* Ledger, 8 Hare, 313.

(*l*) Sanders *v.* Richards, 2 Coll. 568.

(*m*) Emmet *v.* Tottenham, 10 Jur., N. S. 1090.

(*n*) Jones *v.* Pugh, 1 Ph. 96; Harvey *v.* Clayton, 2 Sw. 221, n.

Of Assignees, pendente Lite, of the Mortgagor and Mortgagee.

1076. It is a rule which has been long recognised both in Courts of Law and Equity, and which arises out of the maxim "*pendente lite nihil innovetur*," that he who purchases an interest in litigated property pending the suit, acquires for the purposes of the suit no right distinct from that of his assignor (*o*). The alienation neither gives any new, nor varies any existing rights; and the pendency of the suit is held to be sufficient notice to the purchaser, whose title is disregarded in all subsequent proceedings. And this rule being grounded upon the reason (*p*), that any person interested in the subject matter of a cause, might otherwise harass the other parties to the suit by making occasions for the addition of new parties, is limited in its action to the particular suit pending which the assignment is made, and does not prevent the assignees from enforcing their rights in any other suit.

If, therefore, pending a suit for redemption, the equity of redemption be assigned by the mortgagor, the assignee will be bound (*q*). And *à fortiori* in a foreclosure suit, where the mortgagee is an active party (*r*).

The rule applies equally to assignments by the plaintiff and the defendant; and as well to those which affect the whole equitable estate or interest in question in the suit, as those by which one of several parties assigns his or her separate interest (*s*).

Nor is it material, if after the assignment there be an abatement of the suit by the death of the assignor; but the assignee may in like manner be disregarded when the suit is revived. For he cannot acquire by the death of the assignor any better title than he had before, but will be as much bound by the

(*o*) Co. Litt. 102 b; Metcalfe *v.* Pulvertoft, 2 V. & B. 200; Bishop of Winchester *v.* Paine, 11 Ves. 201. See Trye *v.* Earl of Aldborough, 1 Ir. Ch. R. 666.

(*p*) Metcalfe *v.* Pulvertoft, supra.

(*q*) Garth *v.* Ward, 2 Atk. 175.

(*r*) Bishop of Winchester *v.* Paine, supra.

(*s*) Eades *v.* Harris, 1 Y. & C. C. C. 234.

decree against the representative as he would have been if it had been against the assignor himself (*t*).

1077. The rule in question has, however, been stated, with a reservation, by Lord Redesdale, who says (*u*), "if the suit proceeds without disclosure of the fact;" and where an assignment was made *pendente lite* by a redeeming mortgagor, it was held (*x*) that the assignee was a necessary party, even though he consented to be bound at the hearing; on the ground that the suit could not be prosecuted when the subject of it had been transferred to one who was not a party; and that the defendant was called upon to combat a shadow, and not a real opponent. Sir L. Shadwell, V. C. E., is also reported to have declared (*y*), that if a second mortgagee assign his interest after filing a bill to redeem, the suit cannot be maintained. And in another case it was held (*z*), that in a suit by the first mortgagee of leaseholds to foreclose, assignments made by the plaintiff of her interest *pendente lite* were of such a nature that the case could not have gone on without the presence of the assignees. It is submitted that the cases cited (*a*) by Lord Redesdale are no authority for the restriction which he places upon the rule, and that in fact the doctrine, as laid down by Sir W. Grant and Sir T. Plumer, pre-suppose a disclosure of the assignment; for how otherwise could any question of making the assignees parties have arisen?

(*t*) Bishop of Winchester *v.* Paine, 11 Ves. 197. But this seems to be doubted by Lord St. Leonards, who distrusts the case cited as a precedent, and intimates that the question will probably turn upon the *laches* of the plaintiff in reviving the suit. (V. & P. 1045, 11th ed; 758, ed. 14; see Drew *v.* Earl of Norbury, 3 J. & L. 282.)

(*u*) Mitf. Pl. 73.

(*x*) Johnson *v.* Thomas, 11 Beav. 501.

(*y*) Solomon *v.* Solomon, 13 Sim. 517. And see *S. C.* 7 Jur. 806, and note.

(*z*) Coles *v.* Forrest, 10 Beav. 552. In this case the assignee and his mortgagee filed a supplemental bill, and the question was as to the costs of that proceeding, and only incidentally upon the point whether the suit could have proceeded without them. The cases cited upon the question of costs chiefly related to assignments prior to the suit.

(*a*) Metcalfe *v.* Pulvertoft, 2 V. & B. 200; Daly *v.* Kelly, 4 Dow. 417. Lord Eldon in this case says, that "where there is an alienation pending the suit, though that would not prejudice the plaintiff, yet the alienee must be brought before the court;" but he spoke on the assumption that the alienee had the legal estate, which depends on a different principle.

It does not appear by the reports that any of the authorities (with the single exception of the case of *Eades* v. *Harris*) upon which the rule in question is founded, or the rule itself, were submitted to the learned judges by whom the cases under consideration were decided; and considering the language used by Sir William Grant and Sir T. Plumer, it is difficult to understand the force of Lord Langdale's reasoning in the case of *Johnson* v. *Thomas*. It is distinctly laid down that equity takes no notice of an assignment *pendente lite*, for the purposes of that suit. "As to the litigating parties," says Sir William Grant, "it is as if no such title existed." How then could it be said, that the defendant was left to combat a shadow? For all the purposes of the suit the mortgagor remains the substantial plaintiff, his assignment pending the suit, and *quoad* the other parties to it, being ineffectual. The mortgagee can sustain no injury; for the assignee has no interest or right of redemption against him; neither are the mortgagor's rights less liable to the decree in case it be against him, than if there had been no assignment (*b*).

1078. But where a legal interest passes by the assignment, the assignee's presence becomes necessary; because although the legal interest will be bound in his hands, so as to make him a trustee for the person entitled under the decree, yet unless he be joined, he cannot be compelled to reconvey (*c*).

1079. Neither does the rule apply to a person who, like the assignee in insolvency of the mortgagor (*d*), being no voluntary purchaser, but appointed in an adverse proceeding

(*b*) Coles *v.* Forrest, 10 Beav. 552; and see Higgins *v.* Shaw, 2 Dru. & War. 362; Landon *v.* Morris, 5 Sim. 247, 269; Wood *v.* Surr, 19 Beav. 551; Massy *v.* Batwell, 4 Dru. & War. 68—80; M'Leod *v.* Annesley, 16 Beav. 607. In the last case it was also intimated, that an incumbrancer *pendente lite* of an equitable interest may be bound in a suit relating to the trusts of a deed by rule 4 of 15 & 16 Vict. c. 86, s. 42; which enables one of several *cestuis que trust* to have a decree without serving the others. In the case of Quarrell *v.* Beckford, 1 Mad. 269, a decree was held not to bind assignees, *pendente lite*, who were not parties. The grounds of the decree do not appear, but there were questions of over-payment and collusion, and the foreclosure decree had not been made absolute.

(*c*) Bishop of Winchester *v.* Paine, 11 Ves. 199; Barry *v.* Wrey, 3 Russ. 465; and see Higgins *v.* Shaw, 2 Dru. & War. 362; Massy *v.* Batwell, 4 Dru. & War. 80.

(*d*) Wood *v.* Surr, 19 Beav. 551.

against him, is not bound by a decree in a suit carried on in his absence.

1080. It should be observed, that the doctrine as to binding incumbrancers *pendente lite*, may have been affected by the statute 2 & 3 Vict. c. 11. It is evident, that where there was no actual notice, the rule arose out of the doctrine that *lis pendens* bound all the world (*e*). Hence Sir William Grant remarks upon the hardship of the rule, upon persons who purchase without *actual* notice (*f*). But by the statute above mentioned, no *lis pendens* binds unless the suit be registered (**1159**); and unless the doctrine be held to stand independent of notice, it seems to follow that where there is no actual notice, the purchaser *pendente lite*, not being party to the suit, will not be bound, unless it be duly registered (*g*).

1081. If an assignee desire to bring himself forward in the suit he should file a supplemental bill (*h*). And he may in the same manner bring forward the assignees in insolvency of his immediate assignor, and of the person under whom the latter claims. But leave will not be given him on petition to take part in the suit (*i*).

Nor is it proper for the assignee to file a new bill against the parties to the former suit, other than the assignor, after a decree to account. A bill by an assignee of a subsequent mortgage, against the parties to the former suit, praying the benefit of that suit, and the redemption of prior and foreclosure of subsequent mortgagees, was, as against all but the assignor, dismissed with costs (*k*).

The assignee may be joined by a supplemental bill after a decree to account in the original suit.

1082. It was intimated, but not decided by Lord Eldon, that a mesne incumbrancer *pendente lite*, who has not made himself a party, cannot be allowed to appeal (*l*).

(*e*) Tothill, 45; Worsley *v.* Earl of Scarborough, 3 Atk. 392.

(*f*) 11 Ves. 197; see Landon *v.* Morris, 5 Sim. 247.

(*g*) Note that in the late case of Wood *v.* Snrr, 19 Beav. 551, there was actual notice.

(*h*) Foster *v.* Deacon, 6 Mad. 59; Coles *v.* Forrest, 10 Beav. 552.

(*i*) Foster *v.* Deacon, 6 Mad. 59.

(*k*) Booth *v.* Creswicke, 8 Sim. 352; 8 Jur. 323.

(*l*) Daly *v.* Kelly, 4 Dow. 435.

As the assignee *pendente lite* stands in the place of his assignor, he cannot raise an objection for want of parties, which could not have been raised by the assignor (*m*).

1083. Where a bill for account and payment out of mortgaged estates seeks discovery of incumbrances prior to the plaintiff's, the defendant cannot take an objection on account of the absence of prior incumbrancers (*n*); because the subject of the objection is the very discovery sought by the bill for the purpose of making those persons parties.

A plea that an incumbrance is *now* vested in an incumbrancer was held bad; for at the filing of the bill it might have been vested in the plaintiff: and the plea should have shown that it was then in the incumbrancer (*o*).

1084. New parties cannot be brought before the court, either before or after decree, by a supplemental statement (under 15 & 16 Vict. c. 86, s. 53, and Cons. Ord. XXXII. r. 2) of the circumstances which have created a necessity for the new parties (*p*); a supplemental bill must be filed. Nor can such a statement be filed at all by a defendant, as this would be to allow the defendant to amend the plaintiff's bill (*q*). But, under sect. 52 of the act, an order to revive may be made in every case where it is sought to bring parties before the court, whose presence has become necessary by reason of any transmission of interest or liability (*r*). And this rule was acted upon where a mortgagee had assigned his interest after decree; but with a provision that no additional costs should be thrown upon the mortgagor by the proceeding (*s*).

(*m*) Wood *v.* Surr, 19 Beav. 551.

(*n*) Rawlins *v.* Dalton, 3 Y. & C. 447.

(*o*) Id.

(*p*) Commerell *v.* Bell, 18 Jur. 141.

(*q*) Lee *v.* Lee, 9 Hare, xci.

(*r*) Lowe *v.* Watson, 1 Sm. & Gif. 123; and see Atkinson *v.* Parker, Week. Rep. (1852-3), 43.

(*s*) James *v.* Harding, 24 L. J., Ch. 749. It does not appear by the report, whether a legal mortgage was here in question; but it is presumed that it was so (**1078**).

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